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No.

In The

# Supreme Court of the United States

October Term, 1996

THE CITY OF MORENO VALLEY; FRANK GARCIA; QUENTIN K. STROM; ANDREW RODRIGUEZ; RON SMITH,

*Petitioners,*

*vs.*

DESERT OUTDOOR ADVERTISING, INC. and OUTDOOR MEDIA GROUP, INC.,

*Respondents.*

*Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. May a city, under the regime of *Metromedia, Inc., v. City of San Diego*, 453 U.S. 490 (1981), regulate billboards differently from on-site signage without thereby imposing a content-based regulation abridging the freedom of speech?

II. May a city exempt from the general regulatory scheme applicable to billboards and signs such postings as official notices and directional and informational signs without thereby imposing a content-based regulation abridging the freedom of speech?

III. May a city require a permit, conditioned upon health, safety, and aesthetic factors, for the erection of an outdoor advertising structure (given that, in the nature of the business, such conditions are necessarily content-neutral) without thereby impermissibly abridging the freedom of speech?

IV. Should a severability clause in an ordinance regulating billboards and other signage be given effect when certain provisions (*e.g.*, zoning limitations, permit requirement) are held to be constitutionally infirm but other provisions (*e.g.*, height limits, size limits, landscaping requirements) are not so held?

V. Are individual municipal employees entitled to qualified immunity from suit when they are alleged only to have attempted to enforce an ordinance that has been upheld by three State courts and a United States district court (so that it may be said that even judges could reasonably have believed that the employees' actions did not violate any clearly established rights)?

## LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

## TABLE OF CONTENTS


| | | Page |
|---|---|---|
| QUESTIONS PRESENTED | | i |
| LIST OF PARTIES | | ii |
| TABLE OF CONTENTS | | iii |
| TABLE OF AUTHORITIES | | v |
| PETITION FOR WRIT OF CERTIORARI | | i |
| OPINIONS BELOW | | 1 |
| JURISDICTION | | 1 |
| CONSTITUTIONAL PROVISIONS AND ORDINANCE | | 1 |
| STATEMENT OF THE CASE | | 2 |
| REASONS FOR GRANTING THE WRIT | | 4 |
| I. | IT IS IN THE NATURE OF THE BILLBOARD BUSINESS THAT ANY PERMIT REQUIREMENT FOR THE ERECTION OF BILLBOARDS IS CONTENT-NEUTRAL | 5 |
| II. | LIMITED EXCEPTIONS TO THE GENERALLY APPLICABLE SCHEME DO NOT CONVERT THE ORDINANCE INTO A CONTENT-BASED REGULATION | 7 |
| III. | AN ORDINANCE THAT REGULATES BILLBOARDS DIFFERENTLY FROM OTHER SIGNS DOES NOT NECESSARILY IMPOSE GREATER RESTRICTIONS ON THEM | 9 |
| IV. | THE COURT OF APPEALS SHOULD HAVE GIVEN EFFECT TO THE ORDINANCE'S SEVERABILITY CLAUSE | 12 |
| V. | THE INDIVIDUAL CITY EMPLOYEE DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY FROM SUIT | 14 |

Contents


| | Page |
|---|---|
| CONCLUSION | 16 |
| APPENDIX A. OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT | A-1 |
| APPENDIX B. CITY OF MORENO VALLEY ORDINANCE No. 133 | B-1 |
| APPENDIX C. DISTRICT COURT ORDER | C-1 |

## TABLE OF AUTHORITIES


Page

**Cases Cited:**

*Alaska Airlines, Inc., v. Brock*
480 U.S. 678 (1987) ..... 13

*Behrens v. Pelletier*, — U.S. —,
116 S.Ct. 834 (1996) ..... 15

*Denver Area Educational Telecommunications Consortium, Inc., v. Federal Communications Commission*, — U.S. —,
116 S.Ct. 2374 (1996) ..... 14

*Metromedia, Inc., v. City of San Diego*
453 U.S. 490 (1981) ..... 4, 9, 10, 11

*National Advertising Co. v. City of Orange*
861 F.2d 246 (9th Cir. 1988) ..... 7, 8, 10

*Outdoor Graphics, Inc., v. City of Burlington*
103 F.3d 690 (8th Cir. 1996) ..... 4-5

*Railroad Comm'n of Texas v. Pullman Co.*
312 U.S. 496 (1941) ..... 3

*Regan v. Time, Inc.*
468 U.S. 641 (1984) ..... 13

*United States v. Grace*
461 U.S. 171 (1983). ..... 14

**Federal Statutes Cited:**

23 U.S.C. §131 ..... 7
28 U.S.C. §1254(1) ..... 2
28 U.S.C. §§1331 ..... 2
28 U.S.C. § 1343 ..... 2

Contents

Page

**Other Federal Authorities Cited:**

23 C.F.R. §750.105 *et seq.* ..... 7

Rule 16(e), F.R.CIV.P. ..... 14

**California Statutes Cited:**

BUSINESS & PROFESSIONS CODE §5203 ..... 7

CIVIL CODE §34£0 ..... 14

CODE OF CIVIL PROCEDURE §731 ..... 14

## PETITION FOR WRIT OF CERTIORARI

The City of Moreno Valley, Frank Garcia, Quentin K. Strom, Andrew Rodriguez, and Ron Smith respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on December 20, 1996, in order to reconcile the disposition of this case with the interpretation of the Constitution of the United States set forth in the opinions of the United States Supreme Court.

## OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Ninth Circuit giving rise to this petition is reported at 103 F.3d 814 (9th Cir. 1996) and a copy of the slip opinion is attached as Appendix A to this petition, beginning at page A-1.

## JURISDICTION

The action was commenced in the United States District Court, pursuant to that court's federal question and civil rights jurisdiction, 28 U.S.C. §§1331 and 1343.

The Court of Appeals filed its opinion and entered its judgment in this case on December 20, 1996.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS AND ORDINANCE

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law . . . abridging the freedom of speech . . . .

This provision has been held to be applicable to the States by incorporation in the Fourteenth Amendment to the Constitution of the

United States, which provides:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law.

The complaint in this action challenged the constitutionality of those portions of the Land Use Code of the City of Moreno Valley, California, that govern outdoor advertising (including billboards and other forms of signage). The opinion of the Court of Appeals addressed only City Ordinance No. 133, the full text of which is set forth in Appendix B.

## STATEMENT OF THE CASE

The City of Moreno Valley was incorporated on November 3, 1984, and at that time adopted as its own the ordinances of the County of Riverside that had theretofore been applicable within the area of the newly incorporated city. The ordinances adopted included Article XIX of the county's land use ordinance (County Ordinance No. 348), which article governed billboards and other forms of signage. The City subsequently amended the ordinance, while retaining the same general regulatory scheme. The version of the billboard and signage ordinance at issue in this action is Ordinance No. 133, enacted on June 9, 1987.

The billboard operators (Desert Outdoor Advertising, Inc., and Outdoor Media Group, Inc.) each owned and operated billboards within the City of Moreno Valley; some of those billboards conformed to the ordinance, others did not. The two specific billboards at issue in this action (one belonging to each billboard operator) were each erected in zones where billboards were not a permissible use, without either building permits or conditional use permits, and in admitted contravention of the City's ordinance.

These facts were established in the State court actions, affirmed (as to Outdoor Media Group) by the State appellate court, stipulated to by all parties in the final pretrial order, and undisputed both in the district court and on appeal.

Threatened with civil abatement proceedings in regard to the illegally erected billboards, the billboard operators filed a complaint in the United States District Court for the Central District of California on June 28, 1988, challenging the constitutionality of the City's ordinance and its applicability to one billboard belonging to each of the billboard operators.

The district court, citing *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), abstained from hearing issues arising under California law, retained jurisdiction of the federal constitutional issues, and stayed the action pending resolution of cases then pending in the Superior Court of the State of California for the County of Riverside. Notice of final disposition of the state court actions was filed on June 7, 1993. Thereafter, a final pretrial order was entered, superseding the pleadings. The individual City employee defendants then moved for judgment on the pleadings (i.e., on the final pretrial order); the defendants (the City and its employees) and the plaintiffs (the billboard operators) each moved for summary judgment. By an order, without a written opinion, entered on March 16, 1995, the district court granted judgment on the pleadings in favor of the individual City employees and summary judgment in favor of the City. Appendix C, page C-1.

The billboard operators appealed severally to the United States Court of Appeals for the Ninth Circuit, and their appeals were consolidated. The court of appeals filed its opinion and entered its judgment on December 20, 1996, reversing the district court's judgment and remanding the case to the district court for further

proceedings. In so doing, the court of appeals "declare[d] the entire ordinance invalid" as abridging the billboard operators' freedom of speech. Appendix A, page A-17 and *passim*.

The opinion by the Ninth Circuit states that the City contended that the billboard operators did not have standing to challenge the constitutionality of the City's ordinance. Appendix at page A-8. This is not quite accurate. The City contended that the billboard operators did not have standing to challenge those parts of the ordinance that applied to forms of signage other than billboards (such as the regulation of on-site signs). The City's actual contention was not addressed in the opinion by the Ninth Circuit; however, in its written opinion, the Ninth Circuit the Ninth Circuit does not expressly address other sections of the ordinance, although it holds the whole ordinance unconstitutional.

## REASONS FOR GRANTING THE WRIT

The opinion of the court of appeals, if generally applied, would effectively nullify this Court's opinion in *Metromedia, Inc., v. City of San Diego*, 453 U.S. 490 (1981). It is would be virtually impossible for any municipality to devise a regulatory scheme that would pass muster with the court of appeals, and, therefore, if that court's opinion is allowed to stand, billboard advertising will henceforth be unregulated, at least in the western United States.

Although this Court has held that municipalities may regulate billboards in the interest of public safety and community aesthetics, *Metromedia* at 453 U.S. 512 (plurality opinion), and although other Courts of Appeals have interpreted *Metromedia* to mean that such reasonable regulation is justified as a matter of law, *e.g. Outdoor Graphics, Inc., v. City of Burlington*, 103 F.3d 690,695

(8th Cir. 1996), the Ninth Circuit would invalidate an ordinance regulating billboards based upon a finding that the ordinance lacks "any statement of purpose concerning those interests" or that the City "provided no evidence that the ordinance promoted those interests." Appendix A, page A-3. (Curiously, the court of appeal, in a separate part of its opinion, admitted that the ordinance purports to regulate billboards specifically in the interest of public safety and aesthetics. *See* Appendix A, page A-9; *cf.* Appendix B, page B-4.)

## I

## IT IS IN THE NATURE OF THE BILLBOARD BUSINESS THAT ANY PERMIT REQUIREMENT FOR THE ERECTION OF BILLBOARDS IS CONTENT-NEUTRAL

The primary rationale of the court of appeals in holding the City's ordinance unconstitutional was that the requirement that a billboard operator obtain a conditional use permit for the erection of an outdoor advertising structure gives City officials "unbridled discretion in determining whether a particular sign will be harmful to the community's health, welfare, or 'aesthetic quality.'" Appendix A, page A-12. The Ninth Circuit has held that this allows permits to be granted or withheld based upon the content of the message conveyed on the face of the billboard. It has further held that the permit requirement gives City officials "unfettered discretion to impose prior restraints on speech." Appendix A, page A-16.

However, such an opinion abstracts from the very nature of the billboard business. Billboard operators are not themselves "speakers" or advertisers; they are lessors of space. At the time a billboard is erected, the signage is without content. After the billboard is erected, the content is changeable; that is acknowledged in the ordinance itself. See Appendix B, pages B-2—B-3 (§19.3,

second sentence). Hence, whatever the degree of discretion exercised by City officials, that discretion is content-neutral, and relates only to the time, place, and manner of the display.

Contrary to what the court of appeal has written, the requirement that a billboard operator obtain a conditional use permit and a building permit before erecting a billboard is no more a restriction on speech than is the requirement that a theatre operator obtain building and conditional use permits before erecting a theatre, or than requiring a congretation to obtain building and conditional use permits before erecting a church. The buidling and conditional use pemits in those instances, as in this case, relate to the *structure* and not to the content of the message to be expressed upon or within the structure after it is built.

Actually, the reading by the court of appeals of the City's permit requirement is somewhat eccentric. The language quoted by that court as conferring "unbridled discretion" appears in the prefatory paragraph of a subsection of the longest section of the ordinance. Appendix A, page A-9; Appendix B, page B-4. The immediately following subdivisions of the section comprise detailed lists of "locational standards" and "structural standards" against which the permit application is to be measured, and establish a ministerial duty on the part of city officials to issue the permits if those standards are met. Appendix B, pages B-4—B-8.

Therefore, not only does the City officials' discretion not extend to the content of "speech," it is also not "unfettered." It is limited to determining whether the structure is of a sort permissible within the zone in which it is proposed to be erected, and whether it conforms to the structural and locational standards necessary to insure public safety and to minimize aesthetic detriment.

## II

## LIMITED EXCEPTIONS TO THE GENERALLY APPLICABLE SCHEME DO NOT CONVERT THE ORDINANCE INTO A CONTENT-BASED REGULATION

The City's ordinance exempts four categories of signage from the regulatory scheme generally applicable to off-premises advertising structures/signs: official notices; notices posted by public officials or by any person in giving legal notice; directional, warning, or informational signs required or authorized by law; and a structure erected near the city boundary containing the name of the city and information about civic, fraternal, or religious organizations located in the city. Section 19.2(d), Appendix B, page B-2; *see* Appendix A, pages A-6—A-7

The definition of "advertising structure," including the four exclusions, is derived from the California Outdoor Advertising Act, BUSINESS & PROFESSIONS CODE §5203, Stats. 1970 ch. 991, which was, in turn, amended to conform to federal regulations issued under authority of the Highway Beautification Act, 23 U.S.C. §131. *E.g.*, 23 C.F.R. §750.105 *et seq.* To the extent that the exemption of these categories of signage from the otherwise generally applicable regulatory scheme may result in the regulatory scheme's being held unconstitutional, the entire body of outdoor advertising law in the State of California is rendered constitutionally infirm.

The court of appeals found the exemptions to constitute an impermissible content-based discrimination among types of noncommercial speech. Appendix A, pages A-13—A-14, citing *National Advertising Co. v. City of Orange*, 861 F.2d 246, 247-248 (9th Cir. 1988). It is to be noted that the Moreno Valley ordinance, although drafted prior to the decision of *National Advertising*, has many fewer and much narrower exemptions than the Orange

ordinance had. Hence, in this case the court of appeal has made explicit what was implicit in *National Advertising*, *viz.*, that a city may not, in the Ninth Circuit, permit the posting of weed abatement notices or the erection of "no left turn" signs without opening itself up to unlimited numbers of billboards, signs, posters, and the like.

In a curious procedural twist, the Court of Appeal found that "the City failed to present any evidence that its ordinance promoted a substantial governmental interest, much less a compelling one." Appendix A, page A-14. However, only the granting of the City's motion for summary judgment, and not the denial of the billboard operators' cross-motion, was on appeal. Therefore, on remand, the case should have been permitted to go to trial on that issue, and the City should have been permitted to offer evidence of a substantial or compelling public interest in exempting official notices, traffic signs, and the like from general billboard advertising regulations.

However, it should not be necessary for a municipality to introduce evidence of that which is patent, and of which any court should be able to take judicial notice. It is too obvious to require much in the way of testimony that the posting of official notices is a different type of activity from the erection of billboards, or that traffic direction signs are a form of expression qualitatively different from advertising, whether commercial or noncommercial.

It may be that the court of appeals meant its comment on lack of evidence to be more sweeping than the context in which it is found. The court of appeal may have meant to suggest that the City presented no evidence of a substantial or compelling public interest in the regulation of billboards as such. However, no such evidence is, or ought to be, required, as this Court has made it clear that municipalities have a right, as a matter of law, reasonably to regulate the time, place, and manner of billboard advertising in the interest of

public safety and aesthetics. *Metromedia* at 453 U.S. 512 (plurality opinion).

Moreover, the evidence that the court of appeals indicates is necessary cannot possibly exist. The court of appeals seems to have adopted the billboard operators' position that a municipality must present evidence that its regulatory scheme actually has increased public safety or enhanced the æsthetic quality of the community. *See* Appendix A, at page A-11. But according to the stipulated facts comprised by the final pretrial order—part of the record reviewed by the court of appeals—the subject billboards were never removed, but continued to stand in zones where billboards were not a permissible use. Therefore, the billboard operators' flouting of the law makes it impossible for anyone to know what the effect of the law would have been if it had been observed. The court of appeals has stated a rule the practical effect of which is to impose a burden of proof that, almost by definition, cannot be met.

## III

## AN ORDINANCE THAT REGULATES BILLBOARDS DIFFERENTLY FROM OTHER SIGNS DOES NOT NECESSARILY IMPOSE GREATER RESTRICTIONS ON THEM

The opinion of the court of appeals stands on its head this Court's opinion in *Metromedia*. This Court has held that a municipality may regulate billboards or, indeed, at least implicitly, may ban them outright. In *Metromedia*, this Court made it clear that the right of a municipality to regulate (or to prohibit) billboards is independent of the municipality's regulation of other forms of signage.

In the instant case, however, the court of appeal has held that an ordinance regulating billboards is invalid if it imposes greater restrictions on billboards than are imposed upon other forms of signage. (This is predicated upon the uncritical adoption by the court of appeals of the billboard operators' contention that they lease space to both commercial and noncommercial advertisers, while the owners of other forms of signage display almost exclusively commercial messages. In *Metromedia*, this Court rejected a regulatory distinction based upon whether messages displayed by the lessees of billboard advertising space were commercial or noncommercial in character. In the instant case, as it had done previously in *National Advertising*, the court of appeal concluded that any regulatory scheme that imposes "greater restrictions" on billboards than on other forms of signage automatically has the effect of discriminating against noncommercial, and in favor of commercial, speech.)

Of course, the finding by the court of appeals that the ordinance at issue in the instant case imposes "greater restrictions" on billboards than on other forms of signage is itself suspect. The ordinance imposes restrictions on billboards that are *different* from those imposed on other forms of signage; but those restrictions are not necessarily "greater." For example, while billboards are permitted in only three zones, each billboard is permitted to be much larger, and to be elevated much higher, than other kinds of signs. Appendix A, at page A-2; *but compare* Appendix B, page B-5, §§ 19.3. b(1) and b(2) *with* pages B-11—B-13, §§19.4.a(1) through (4).

The economics of the billboard industry make the construction of and rental of space on smaller signs (such as those permitted outside of manufacturing and service-commercial zones) a nonremunerative activity. The goal of the billboard operators in

this action has never been to erect 50-to-150 square foot signs in other zones; it has been to maintain two-sided or V-shaped structures, with 300 square feet of advertising space per side, outside of manufacturing and service-commercial zones. That is, the billboard operators want to keep the benefit of less restrictive size and height regulations that are currently applicable to billboards, and *also* to have the benefit of the less restrictive zoning regulations applicable to other forms of signage. The court of appeal seems to have given the billboard operators all that they ever wanted, even though the court of appeals had to address issues that were not properly before it—and were not briefed by either side—to do so.

The court of appeals found it necessary to strike down, as unconstitutional, all "restrictions on off-site noncommercial speech, including the zoning limitations and exceptions." Appendix A, at page A-15. The court of appeals then went on "[to] declare the entire ordinance invalid." (This declaration is ambiguous, of course, as it would literally invalidate the part of the ordinance that purports to amend the pre-existing ordinance, and so would reinstate the pre-existing, or unamended, ordinance as the applicable law in the City of Moreno Valley.)

Particularly troubling is, or ought to be, the language used by the court of appeals in its declaration of invalidity. The words chosen by the court of appeals are directly contrary to the holding of this Court in *Metromedia*. "[W]e must strike the definition and restrictions on off-site noncommercial speech . . . ," wrote the court of appeal, invalidating the City's content-neutral regulatory scheme and, apparently, requiring the City to adopt disparate regulations for off-site commercial and off-site noncommercial signage. Appendix A, at page A-15.

## IV

## THE COURT OF APPEALS SHOULD HAVE GIVEN EFFECT TO THE ORDINANCE'S SEVERABILITY CLAUSE

The ordinance at issue in this case, Ordinance no. 133, amended part of the City of Moreno Valley's zoning and land use law. The ordinance purports to regulate outdoor advertising in a number of ways. The ordinance establishes limits for the display area and height of various forms of signage that may be permitted in each zone, as well as limits on how close various kinds of signs may be one to another. Not all of these limitations were under attack in the underlying litigation; most of them were not addressed in the district court proceedings or briefed on appeal. It is by no means clear that the billboard operators, who filed the original complaint, meant to seek the elimination of all limits—such a result might, ultimately, confer a competitive advantage upon their rivals.

So eager was the court of appeals to reach a particular result that it overlooked the pleadings and the record below, and commenced its own assault on the City's outdoor advertising ordinance. Ultimately, although the billboard operators had sought the invalidation only of those parts of the ordinance that proscribed their erecting billboards in residential, commercial, and light industrial zones, the court of appeals saw fit to strike down the ordinance in its entirety. (As has been pointed out supra, the opinion is ambiguous: Ordinance no. 133 did not repeal, but only amended, its predecessor; the invalidation of that ordinance arguably reinstates the ordinance as it stood prior to amendment.)

The Ordinance at issue contains a severability clause, and the court of appeals acknowledged as much. Appendix B, at page B-14; Appendix A, at page A-14. However, for reasons only partially

divulged in its opinion, the court of appeal held that so much of the ordinance as the court of appeal did not "strike" could not "function independently," and so "declare[d] the entire ordinance invalid." Appendix A, at pages A-14—A-15.

Unless its opinion is read as reinstating the *status quo ante* the adoption of Ordinance no. 133, the court of appeals will have declared invalid such provisions as those limiting the spacing of billboards along public highways (Appendix B, page B-4), prohibiting the erection of billboards within highway rights of way (*id.*, page B-5) or adjacent to a landscaped freeway (*id.*, page B-10), setting maximum display areas and heights for billboards and other signs (*id.*, pages B-5, B-11), a requirement for landscaping around billboard structures (*id.*, page B-6), setting forth an amortization period for billboards (*id.*, page B-9), regulating signage within shopping centers (*id.*, page B-12) or attached to buildings (*id.*), and others. None of these provisions was the subject of the complaint, none was addressed in the final pretrial order, none was briefed to the Court of Appeal.

In holding the whole of the ordinance unconstitutional, despite the severability clause, the court of appeal disregarded or misapplied the standards for severability established by this Court in *Alaska Airlines, Inc., v. Brock*, 480 U.S. 678, 684 (1987). Clearly, the provisions in the ordinance that were never challenged by the billboard operators (such as height and separation requirements) can be administered independently of any provision that the court of appeals actually held invalid.

This Court has often stated that effect should be given to severability clauses, and that no more of a statute should be held invalid than is necessary. *E.g., Regan v. Time, Inc.*, 468 U.S. 641 (1984). Moreover, this Court has severed unconstitutional portions

of a statute for purposes of invalidation even in the absence of an express severability clause and even in cases in which a statute is challenged on First Amendment grounds. E.g., *Denver Area Educational Telecommunications Consortium, Inc., v. Federal Communications Commission*, — U.S. —, —, 116 S.Ct. 2374 (1996); *United States v. Grace*, 461 U.S. 171 (1983).

## V

## THE INDIVIDUAL CITY EMPLOYEE DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY FROM SUIT

Almost as an afterthought, the court of appeals reversed the district court's order granting judgment on the pleadings in favor of four individual City employee defendants. Appendix A, pages A-15—A-16. The "pleadings" on which the individuals had moved for judgment amounted precisely to the final pretrial order, which had superseded the complaint and answer. Rule 16(e), F.R.CIV.P.

According to the stipulated facts in the pretrial conference order, the individual City employee defendants had attempted to enforce the City's ordinance by citing the billboard operators' illegal structures and by somehow causing the initiation of a civil abatement action in the State courts. (Civil abatement actions are, as a matter of California law, prosecuted by the city attorney in the name of the People of the State of California; therefore, the officials named as defendants—none of whom is the city attorney—cannot have commenced the action against either of the plaintiff billboard operators. California CIVIL CODE §3480 and CODE OF CIVIL PROCEDURE §731.) There was never any basis in law or fact for naming any of the individual City employees as a defendant, and each of them was entitled to judgment on the pleadings. Alternatively, each of the individual defendants was also a co-

movant with the City of the defendants' motion for summary judgment.

The court of appeal held that the individual City employees were not entitled to qualified immunity because "it has been clearly established that a licensing scheme is impermissible if it allows officials unfettered discretion to impose prior restraints on speech." Appendix A, at page A-16. However, it was not clearly established, prior to the issuance of its opinion by the court of appeals, and is not now clearly established to the extent that the court of appeals erred, that Ordinance no. 133 confers such unfettered discretion. Three California courts and one United States district court upheld the ordinance against challenges of various kinds—the district court against the very interpretation urged by the court of appeals. Where judicial officers, including a United States district judge, have not found such "unfettered discretion," the matter cannot be so clearly established that a relatively low-ranking public employee can reasonably be expected to have found it.

The test for qualified immunity includes the query whether a reasonable officer, similarly situated, would have understood that his conduct constituted a violation of the plaintiff's rights under clearly established law. E.g., *Behrens v. Pelletier*, — U.S. —, —,116 S.Ct. 834, 838-839 (1996). Here, the individual City employee defendants were entitled to qualified immunity because no conduct alleged in the "pleadings" (*i.e.*, in the final pretrial order) was such that a reasonable public employee, similarly situated, would have recognized it as a violation of the billboard operators' rights under clearly established law. The opinion of the court of appeals would expose those individual defendants to potential liability simply on the basis of their having been employees of a city whose ordinance was held (at the appellate level only) to confer

"unfettered discretion" without any allegation that the individual public employees abused that discretion.

## CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A -- OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DESERT OUTDOOR ADVERTISING, INC., and OUTDOOR MEDIA GROUP, INC.,

*Plaintiffs-Appellants,*

v.

THE CITY OF MORENO VALLEY; FRANK GARCIA; QUINTIN K. STROM; ANDREW RODRIGUEZ; RON SMITH,

*Defendants-Appellees.*

Nos. 95-55529
95-55531

D.C. No.
CV-88-03689-TJH

OPINION

Appeals from the United States District Court
for the Central District of California
Terry J. Hatter, District Judge, Presiding

Argued and Submitted:
October 7, 1996—Pasadena, California

Filed December 20, 1996

Before: Procter Hug, Jr., Chief Judge, Harry Pregerson and Stephen Reinhardt, Circuit Judges.

Opinion by Judge Pregerson;
Concurrence by Judge Reinhardt

## SUMMARY

### Business Law/Advertising

The court of appeals reversed a district court judgment. The court held that a sign ordinance imposing greater restrictions

on noncommercial speech than on commercial speech and including content-based exemptions for certain noncommercial signs is unconstitutional.

Appellee City of Moreno Valley adopted an ordinance regulating both "off-site" and "on-site" signs. The ordinance imposed different restrictions on off-site and on-site signs. On-site structures and signs were limited to commercial speech but could be erected in any zone and no permit was required.

Off-site structures and signs could contain commercial and noncommercial messages but could be erected only in three zones and required a permit. The issuance of a permit was subject to a finding by City officials that the sign would not be harmful to the community's health, welfare, or aesthetic quality. Certain off-site signs were exempt from the location and permit requirements: official notices; warning, directional, and informational signs authorized or required by law; and, city and county name signs.

Appellants Desert Outdoor Advertising, Inc. and Outdoor Media Group (OMG) were billboard operators conducting business in the City. Both had off-site signs violating the ordinance and built without a permit. The City sued Desert and OMG in state court to compel removal of the signs.

Desert and OMG sued the City and individual public officials in federal court, challenging the constitutionality of the sign ordinance. The district court stayed the action pending the outcome of the state litigation. The state court entered judgment in favor of the City and issued a permanent injunction requiring Desert and OMG to remove the signs. OMG unsuccessfully appealed and Desert did not appeal. Both sides moved for summary judgment on the federal claims. The district court entered judgment in favor of the City and entered judgments on the pleadings in favor of the individual officials based on qualified immunity. Desert and OMG appealed.

[1] Desert and OMG showed all three elements of standing: they each suffered an injury in fact because the City actually brought an enforcement action against them, their injuries were directly traceable to the City's conduct, and a declaration that the ordinance is unconstitutional would likely redress their injuries by enabling them to maintain their signs. [2] They also had standing to challenge the permit requirement, even though they did not apply for permits, because applying would have been futile.

[3] A law cannot condition the free exercise of First Amendment rights on the "unbridled discretion" of government officials. [4] The ordinance contained no limits on the authority of City officials to deny a permit. They had unbridled discretion in determining whether a particular sign would be harmful to the community's health, welfare, or aesthetic quality. The permit requirement was unconstitutional.

[5] To be valid, an ordinance that restricts commercial speech that concerns lawful activity and is not misleading must seek to implement a substantial government interest. The City had the burden of affirmatively establishing that. [6] Although aesthetics and safety represent substantial governmental interests, the City did not show that it enacted its ordinance to further any interest in aesthetics and safety. The ordinance lacked any statement of purpose concerning those interests and the City provided no evidence that the ordinance promoted those interests. The district court erred in granting summary judgment in favor of the City.

[7] An ordinance is invalid if it imposes greater restrictions on noncommercial than on commercial billboards or regulates noncommercial billboards based on their content. [8] The ordinance unconstitutionally imposed greater restrictions on noncommercial signs than it did on commercial signs, [9] and it also violated the First Amendment because it regulated noncommercial speech on the basis of content.

[10] The City exempted certain noncommercial off-site signs from the general zoning restriction for such signs. Because the exemptions required City officials to examine the content of noncommercial off-site signs to determine whether the exemption applied, the regulation was content-based and [11] unconstitutional unless the City established that it was necessary to serve a compelling state interest. The City failed to present any evidence that the ordinance promoted a substantial governmental interest, much less a compelling one.

[12] Because the balance of the ordinance could not function independently after the striking of the unconstitutional provisions, the entire ordinance was invalid.

[13] The City officials were not entitled to qualified immunity. For over 50 years, it had been clearly established that a licensing scheme was impermissible if it allowed officials unfettered discretion to impose prior restraints on speech.

Judge Reinhardt concurred, writing that it was far from clear that the ordinance exempted on-site signs from the permit requirement or that it permitted on-site signs in all areas of the City, including residential zones.

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## COUNSEL

Paul E. Fisher, Fisher & Delsack, Newport Beach, California, for plaintiff-appellant, Outdoor Media Group, Inc.

Michael F. Wright, Case, Knowlson, Mobley & Burnett, Los Angeles, California, for plaintiff-appellant, Desert Outdoor Advertising, Inc.

Dennis J. Mahoney, Mac Lachlan, Burford & Arias, San Bernardino, California, for the defendants-appellees.

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## OPINION

PREGERSON, Circuit Judge:

Appellants Desert Outdoor Advertising, Inc. ("Desert") and Outdoor Media Group, Inc. ("OMG") are billboard operators who conduct business in the City of Moreno Valley. In a suit against the City and several of its public officials, appellants challenged the constitutionality of Moreno Valley Ordinance No. 133, which regulates structures and signs. The district court granted summary judgment in favor of the City and granted judgment on the pleadings in favor of the public officials. The court denied appellants' summary judgment motion. We have jurisdiction under 28 U.S.C. § 1291. We reverse.

## BACKGROUND

The City of Moreno Valley was incorporated on December 3, 1984, in a formerly unincorporated area of Riverside County. In June 1987, the City adopted Moreno Valley Ordinance No. 133 based on a similar pre-existing Riverside County Ordinance.

Moreno Valley Ordinance No. 133 regulates both "off-site" and "on-site" structures and signs. Off-site structures and signs may include commercial or noncommercial messages. On-site structures and signs may only contain commercial messages. Off-site structures and signs are defined as structures and signs "used for the display of political messages and the promotion of products, goods, services, or business establishments not conducted, manufactured, or sold upon the premises on which the display is located." Moreno Valley Ordinance No. 133, § 19.2(a). The ordinance defines "on-site" structures and signs as "structures and signs that are erected or maintained to advertise goods sold, business conducted or

services rendered on the parcel of land upon which the sign is located." *Id.* § 19.2(e).[1]

The ordinance imposes different restrictions on off-site and on-site structures and signs. Off-site structures and signs are subject to locational and structural restrictions and may be erected in only three zones in the City (medium manufacturing, heavy manufacturing, and service commercial). *Id.* § 19.3(a) & (b). Moreover, before anyone can erect an off-site sign, the ordinance requires that the person apply for a conditional use permit. *Id.* § 19.3(c). The ordinance states that the issuance of a permit by City officials is subject to findings that

> such a display will not have a harmful effect upon the health or welfare of the general public and will not be detrimental to the welfare of the general public and will not be detrimental to the aesthetic quality of the community or the surrounding land uses.

*Id.* § 19.3.

In contrast, on-site structures and signs, as long as they conform to certain restrictions, may be erected in any zone of the City. *Id.* § 19.4. Furthermore, no conditional use permit is required before erecting an on-site structure or sign.

Finally, four categories of off-site structures and signs are exempted from the locational restrictions and may be placed in any zone in the City. The exempted structures and signs are:

> (1) Official notices issued by any court or public body or officer;

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[1]The ordinance contains an obvious typographical error and mistakenly refers to section "19.2(e)" as "19.2(3)." We will refer to this section as "19.2(e)" as the drafters intended.

(2) Notices posted by any public officer in performance of a public duty or by any person in giving legal notice;
(3) Directional, warning or information structures required by or authorized by law or by Federal, State or City authority; including signs necessary for the operation and safety of public utility uses;
(4) A structure erected near a city or county boundary, which contains the name of such city or county and the names of, or any other information regarding, civic, fraternal or religious organizations located therein.

*Id.* § 19.2(d). Before the incorporation of the City, appellant Desert constructed an off-site sign on a location outside the three zones permitted under the ordinance. Desert built and maintained this off-site sign without county or City permits. County zoning laws in effect at that time did not allow off-site signs at that location. In 1987, the City annexed territory which included the location of Desert's off-site sign. In May 1988, appellant OMG built an off-site sign within the City's limits, but outside the three zones permitted under the ordinance. OMG did not obtain county or City permits either.

The City brought two separate state court actions against Desert and OMG to compel the removal of the Desert and OMG signs. Desert and OMG filed their own action against the City in United States District Court for damages, declaratory relief, and an injunction. The district court stayed that action pending outcome of the state court litigation. However, the district court retained jurisdiction over the federal constitutional claims. The state court entered judgment in favor of the City and against Desert and OMG on the state law claims, and issued a permanent injunction requiring Desert and OMG to remove their signs. OMG unsuccessfully appealed the state court's rulings, while Desert did not appeal. The City then filed a notice with the district court that the state court proceedings had concluded.

Desert, OMG, and the City then filed cross-motions for summary judgment on their federal claims. The various public officials named as individual defendants moved for judgment on the pleadings based on qualified immunity. The district court entered a judgment in favor of the City and the individual public officials, which Desert and OMG now appeal.

## ANALYSIS

### I. Standing

The City contends that Desert and OMG do not have standing to challenge the constitutionality of its sign ordinance and the permit process. We review the question whether appellants have standing de novo. *Barrus v. Sylvania*, 55 F.3d 468, 469 (9th Cir. 1995).

To have standing, Desert and OMG must satisfy three elements: (1) they must have suffered an injury in fact; (2) the injury must be fairly traceable to the City's challenged conduct and not the result of the independent action of some third party; and (3) it must be likely that the injury will be redressed by a favorable decision. *Medina v. Clinton*, 86 F.3d 155, 157 (9th Cir. 1996).

[1] In this case, Desert and OMG have shown all three elements of standing. First, appellants suffered an injury in fact because the City actually brought an enforcement action against appellants. *See Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988) (standing requires party to have "actual and well-founded fear that the law will be enforced against them"); *Blair v. Shanahan*, 38 F.3d 1514, 1519 (9th Cir. 1994) (courts inquire whether "plaintiffs showed a reasonable threat of prosecution under the statute"). Second, appellants' injury is directly traceable to the City's conduct in passing the ordinance and in attempting to compel appellants to remove their signs. Third, a declaration that the

ordinance is unconstitutional would likely redress Desert and OMG's injuries by enabling them to maintain their signs.

[2] Desert and OMG also have standing to challenge the permit requirement, even though they did not apply for permits, because applying for a permit would have been futile. *Aleknagik Natives Ltd. v. Andrus*, 648 F.2d 496, 499 (9th Cir. 1980) (plaintiffs need not exhaust administrative remedies when doing so would be futile). Applying for a permit would have been futile because: (1) the City brought state court actions against Desert and OMG to compel them to remove their signs; and (2) the ordinance flatly prohibited appellants' off-site signs located outside the three permitted zones.

## II. The Permit Requirement for Off-Site Structures and Signs

Desert and OMG contend that the permit requirement violates the First Amendment because it gives "unbridled discretion" to City officials. We review the district court's grant of summary judgment de novo. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1261 (1996).

A person must obtain a permit before erecting an off-site structure or sign. Although the issuance of a permit by City officials is subject to some objective criteria relating to locational and structural standards, City officials have discretion to deny a permit on the basis of ambiguous and subjective reasons. For example, the ordinance states that a permit shall issue subject to findings that the structure or sign "will not have a harmful effect upon the health or welfare of the general public and will not be detrimental to the welfare of the general public and will not be detrimental to the aesthetic quality of the community or the surrounding land uses." Moreno Valley Ordinance No. 133, § 19.3.

[3] As the Supreme Court stated, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of

a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). Furthermore, we have noted that "a law cannot condition the free exercise of First Amendment rights on the 'unbridled discretion' of government officials." *Gaudiya Vaishnava Soc'y v. City and County of San Francisco*, 952 F.2d 1059, 1065 (9th Cir. 1990) (citing *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755 (1988)), *cert. denied*, 504 U.S. 914 (1992).

[4] Moreno Valley Ordinance No. 133 contains no limits on the authority of City officials to deny a permit. City officials have unbridled discretion in determining whether a particular structure or sign will be harmful to the community's health, welfare, or "aesthetic quality." Moreover, City officials can deny a permit without offering any evidence to support the conclusion that a particular structure or sign is detrimental to the community. Thus, we conclude that the permit requirement is unconstitutional.

## III. Regulation of Commercial Speech

[5] To be valid, an ordinance that restricts commercial speech that concerns lawful activity and is not misleading must (1) seek to implement a substantial governmental interest; (2) directly advance that interest; and (3) reach no further than necessary to accomplish the given objective. *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604, 610 (9th Cir. 1993) (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm.*, 447 U.S. 557, 563-66 (1980)). As the party seeking to regulate commercial speech, the City has the burden of affirmatively establishing that the ordinance meets each of these three elements. *Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989); *see also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 n.20 (1983) ("party seeking to uphold a restriction on commercial speech carries the burden of justifying it").

Appellants contend that the City has failed to establish the existence of a substantial governmental interest that satisfies the first prong of the *Central Hudson* test. We agree.

[6] Although aesthetics and safety represent substantial governmental interests, *see Metromedia, Inc. v. San Diego*, 453 U.S. 490, 507-08 (1981) ("traffic safety and the appearance of the city are substantial governmental goals"), in this case, the City has not shown that it enacted its ordinance to further any interest in aesthetics and safety. The ordinance lacks any statement of purpose concerning those interests. *See National Advertising Co. v. Town of Babylon*, 900 F.2d 551, 555-56 (2d Cir.) (invalidating ordinance containing no statement of purpose), *cert. denied*, 498 U.S. 852 (1990). Furthermore, the City provided no evidence that the ordinance promotes those interests. Because the City failed to provide any evidence that it had an interest in safety and aesthetics or that the ordinance furthered those interests, the district court erred in granting summary judgment in favor of the City.[2]

## IV. Regulation of Noncommercial Speech

[7] Under the Supreme Court's decision in *Metromedia*, "an ordinance is invalid if it imposes greater restrictions on noncommercial than on commercial billboards or regulates noncommercial billboards based on their content." *National Advertising Co. v. City of Orange*, 861 F.2d 246, 248 (9th Cir. 1988) (citing *Metromedia*, 453 U.S. at 513, 516). We find that

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[2]Insofar as billboards are concerned, the burden on the City of meeting the first prong of the *Central Hudson* test is not a great one. Had the City enacted the ordinance with a clear statement of purpose indicating the City's interest in eliminating the hazards posed by billboards to pedestrians and motorists and in preserving and improving its appearance, the City would have demonstrated that the ordinance sought to implement substantial governmental interests, and would thus have satisfied the first prong of the *Central Hudson* test. *See Metromedia*, 453 U.S. at 493, 507-10 (recognizing that billboards are "real and substantial hazards to traffic safety" and "by their very nature . . . can be perceived as an 'esthetic harm' ").

the ordinance's restrictions on noncommercial speech are invalid on each of these grounds.

A. Greater Restrictions on Noncommercial Speech

Under the ordinance, on-site structures and signs are limited to commercial structures and signs. *See* Moreno Valley Ordinance No. 133, § 19.2(e) (on-site structures and signs are structures and signs erected "to advertise *goods sold, business conducted* or *services rendered*") (emphasis added). These on-site commercial structures and signs may be erected in any zone of the City without obtaining a permit. *Id.* § 19.3. In contrast, off-site structures and signs can include both commercial structures and signs and noncommercial "political messages." *Id.* § 19.2(a). The ordinance restricts these off-site structures and signs, including noncommercial messages, to three zones. Moreover, the ordinance requires that anyone seeking to erect such a structure or sign first obtain a permit. *Id.* § 19.3(a).

[8] Moreno Valley Ordinance No. 133 unconstitutionally imposes greater restrictions upon noncommercial structures and signs than it does upon commercial structures and signs. *See Metromedia*, 453 U.S. at 513 (invalidating ordinance allowing on-site *commercial* signs but not allowing on-site *noncommercial* signs).

For example, while a business owner located outside the three permitted zones can have an on-site commercial sign, that owner may not display an "Elect Jane Doe" sign because such signs are prohibited outside the three permitted zones. Similarly, homeowners may not post a "Vote for Smith" sign in their yards unless they live within the three zones and first obtain a permit.

As the Supreme Court aptly noted in *Metromedia*, "[t]he fact that the city may value commercial messages relating to onsite goods and services more than it values commercial

communications relating to offsite goods and services does not justify prohibiting an occupant from displaying its own ideas or those of others." *Id.*

## B. Content-Based Regulation

[9] The City's ordinance also violates the First Amendment because it regulates noncommercial speech on the basis of content. *National Advertising*, 861 F.2d at 248. In *National Advertising*, we invalidated an ordinance that regulated noncommercial billboards based upon their content. *Id.* In that case, the City of Orange passed an ordinance that prohibited commercial and noncommercial off-site signs, subject to several exemptions for certain noncommercial off-site signs such as governmental signs and traffic flow and safety signs. *Id.* at 247, 248 n.2. In *National Advertising*, we noted that exemptions to the restriction on noncommercial signs required examination of the content of those signs because "[i]n most instances, whether offsite noncommercial signs are exempted or prohibited turns on whether or not they convey messages approved by the ordinance." *Id.* at 248.

[10] In this case, as in *National Advertising*, the City has exempted certain noncommercial off-site structures and signs from the general zoning restriction for such signs. Moreno Valley Ordinance No. 133, § 19.2(d) (allowing, for example, official notices and directional or informational signs in any zone). Because the exemptions require City officials to examine the content of noncommercial off-site structures and signs to determine whether the exemption applies, the City's regulation of noncommercial speech is content-based. *See Metromedia*, 453 U.S. at 515 ("With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse."); *National Advertising*, 861 F.2d at 248 (holding ordinance unconstitutional when exemptions to ordinance's restrictions depend upon content of noncommercial messages.); *National Advertising Co. v. Town of Babylon*, 900 F.2d 551, 557 (2d Cir.) (exemptions from noncommercial

speech restriction "impermissibly discriminates between types of noncommercial speech based upon content"), *cert. denied*, 498 U.S. 852 (1990).

[11] This content-based restriction is unconstitutional unless the City establishes that the ordinance is " 'necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.' " *National Advertising*, 861 F.2d at 249 (*quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). In this case, the City failed to present any evidence that its ordinance promoted a substantial governmental interest, much less a compelling one. Thus, we find that the ordinance is unconstitutional because it impermissibly regulates noncommercial speech on the basis of content.[3]

## V. Severance

Section 2.1 of the ordinance contains a severability clause which states:

> It is the intention of the City Council in adopting this ordinance that each provision, section, sentence, clause and phrase shall be given effect and enforced to the extent legally possible without regard to whether any other provision, section, sentence, clause or phrase is found to be invalid or unenforceable.

Generally, only that part of an ordinance that is constitutionally infirm will be invalidated, leaving the rest intact. *National Advertising*, 861 F.2d at 249. However, "[w]hether partial invalidation is appropriate depends on the intent of the City in passing the ordinance and whether the balance of the ordinance can function independently." *Id.* at 249-50.

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[3]Because we find the ordinance unconstitutional under the First Amendment, we need not address appellants' Equal Protection or takings claims.

We have held the City's ordinance invalid because: (1) it has a standardless permit requirement; (2) the City has failed to establish a substantial governmental interest in regulating commercial speech; (3) it imposes greater restrictions upon noncommercial than upon commercial speech; and (4) the exemptions for certain noncommercial structures and signs are content-based and not supported by a compelling governmental interest.

To invalidate the constitutionally infirm parts of the ordinance, we must strike the permit requirement. We also must strike the definition and regulation of on-site commercial structures and signs which allowed only on-site commercial signs in any zone of the City. Finally, we must strike the definition and restrictions on off-site noncommercial speech, including the zoning limitation and the exemptions.

[12] Because the balance of the ordinance cannot function independently after we strike the unconstitutional provisions, we need not consider the City's intent in passing the ordinance, and we declare the entire ordinance invalid.

## VI. Qualified Immunity

We review a grant of judgment on the pleadings de novo. *Marx v. Loral Corp.*, 87 F.3d 1049, 1053 (9th Cir. 1996). A judgment on the pleadings is properly granted when, taking all the allegations in the pleading as true, the moving party is entitled to judgment as a matter of law. *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1488 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 418 (1995).

Government officials performing discretionary functions are shielded from civil liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

[13] Here, the City officials are not entitled to qualified immunity. For over fifty years, it has been clearly established that a licensing scheme is impermissible if it allows officials unfettered discretion to impose prior restraints on speech. *See Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 & n.2 (1969) (citing decisions from the preceding thirty years). Furthermore, the Supreme Court's decision in *Metromedia* and our holding in *National Advertising* make it clear that a City cannot impose greater restrictions on commercial speech than on noncommercial speech, and cannot regulate noncommercial speech on the basis of content. Because the City officials, in attempting to enforce the ordinance, violated clearly established constitutional rights of which a reasonable person would have known, they are not entitled to qualified immunity. Thus, we reverse the district court's grant of judgment on the pleadings.

REVERSED AND REMANDED.

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REINHARDT, Circuit Judge, concurring:

I agree with the majority's excellent opinion and all of its analysis, with one minor exception. It is far from clear that the ordinance exempts on-site structures and signs from the permit requirement or that it permits such structures and signs in all areas of the City, including residential zones. Section 19.2(e) of the ordinance defines on-site signs as a category of "outdoor advertising displays." Section 19.3 then imposes a permit requirement on *all* outdoor advertising displays and makes no exception for on-site signs. Section 19.3(a) further states that outdoor advertising displays "shall be permitted only within the M-M (Medium Manufacturing), M-H (Heavy Manufacturing), and the M-S-C (Service Commercial) Zones and will not be permitted in any other zone." § 19.3(a)(1).

It must be noted that the majority's interpretation is a valiant and plausible attempt to make sense of what is a very

poorly drafted law. The ordinance is internally contradictory in its use of the terms "displays" and "structures" and appears to use those terms indiscriminately and inconsistently, even within a single provision. *See, e.g.*, § 19.3(c)(1) (governing permit applications). Moreover, the provision that purports to regulate on-site signs is simply unintelligible: "No person shall erect an on-site advertising structure or sign in the City of Moreno Valley that is in violation of the provisions contained within any specific zoning classification in this ordinance that is in violation of the following provisions." § 19.4. Thus, it is easy to see why the majority, struggling to arrive at a rational construction of the ordinance, interprets it as it does.

Whether or not one construes the ordinance in the same manner as the majority, the majority's essential arguments remain correct. Specifically, under both its construction and mine, it remains clear that the ordinance discriminates against political speech. Section 19.5 of the ordinance permits "for sale, lease or rent signs" to be placed in all zones of the City, and section § 19.(2)(d) entirely exempts from regulation four additional types of nonpolitical signs. Political speech, however, is permissible only in the form of off-site displays, which are restricted to the manufacturing and service-commercial zones specified in section 19.3(a)(1). Thus, under either construction, the majority's holding regarding political speech remains the same.

The majority's remaining conclusions — namely, that the ordinance imposes a standardless licensing requirement, and that it regulates speech on the basis of content — are entirely unaffected by our minor disagreement over one aspect of the ordinance, and I share those conclusions without reservation.

# APPENDIX B -- ORDINANCE NO. 133

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MORENO VALLEY, CALIFORNIA, AMENDING LAND USE ORDINANCE NO. 348, BY AMENDING THE REGULATIONS RELATING TO OUTDOOR ADVERTISING DISPLAYS

The City Council of the City of Moreno Valley does ordain as follows:

SECTION 1. AMENDMENT OF ADVERTISING REGULATIONS, RELATING TO OUTDOOR ADVERTISING DISPLAYS:

Ordinance No. 348 of the County of Riverside, as adopted and in force within the City of Moreno Valley, is hereby amended as follows:

1.1 Article XIX entitled "Advertising Regulations" is hereby amended to read as follows:

"ARTICLE XIX

ADVERTISING REGULATIONS

SECTION 19.1 All outdoor advertising displays and on-site advertising structures and signs in the City of Moreno Valley shall conform to the applicable provisions of this Article. If any specific zoning classification contained within this ordnance shall impose more stringent requirements than are set forth in this Article, the more stringent provisions shall apply.

SECTION 19.2 DEFINITIONS. For purposes of this ordinance, the following words or phrases shall have the following definitions.

a. "Outdoor Advertising Display" means outdoor advertising structures and outdoor advertising signs used for the display of political messages and the promotion of products, goods, services, or business establishments not conducted, manufactured, or sold upon the premises on which the display is located.

b. "Outdoor Advertising Structure" means a structure of any kind or character erected or maintained for outdoor advertising purposes, upon which any poster, bill, printing, painting or other advertisement of any kind whatsoever may be placed, including statuary, for outdoor advertising purposes.

c. "Outdoor Advertising Sign" means any card, cloth, paper, metal, painted, plastic or wooden sign of any character placed for outdoor advertising purposes, on or to the ground or any tree, wall, bush, rock, fence, building, structure or thing, either privately or publicly owned, other than an outdoor advertising structure.

d. The words "Outdoor Advertising Structure" and "Outdoor Advertising Sign" as defined in subsections (b) and (c) do not include:

(1) Official notices issued by any court or public body or officer;

(2) Notices posted by any public officer in performance of a public duty or by any person in giving legal notice;

(3) Directional, warning or information structures required by or authorized by law or by Federal, State or City authority; including signs necessary for the operation and safety of public utility uses;

(4) A structure erected near a city or county boundary, which contains the name of such city or county and the names of, or any other information regarding, civic, fraternal or religious organizations located therein.

3. "On-site Advertising Structures and Signs" means structures and signs that are erected or maintained to advertise goods sold, business conducted or services rendered on the parcel of land upon which the sign is located.

f. "Freeway" means a divided arterial highway for through traffic with full control of access and with grade separations at intersections.

g. "Highway" means roads, streets, boulevards, lanes, courts, places, commons, trails, ways or other rights-of-way or easements used for or laid out and intended for the public passage of vehicles or of vehicles and persons.

h. "Edge of a Right-of-Way" means a measurement from the limit of the public right-of-way measured along a line equidistant from and parallel to the centerline of the freeway or highway.

i. "Maximum Height" means the highest point of the structure or sign measured from the average natural ground level at the base of the supporting structure.

j. "Free Standing Sign" means any sign which is supported by one or more columns or uprights imbedded in the ground, and which is not attached to any building or structure.

k. "Surface Area" means that area of outdoor advertising signs and on-site advertising signs as measured by the smallest geometric form such as a square, rectangle, triangle, or circle, or combination thereof, which will encompass the face of the sign on which the message is displayed.

l. "For Sale, Lease or Rent Sign" means a sign advertising that the property or structure upon which the sign is located is for sale, lease, or rent.

m. "Shopping Center" means a parcel of land, or contiguous parcels of land, not less than 3 acres in size, on which there exists 4 or more separate business uses that have mutual parking facilities.

n. "Directional Sign" means a sign used to direct and control vehicular or pedestrian traffic that is located upon the same parcel of land as the use that it is intended to serve.

SECTION 19.3 <u>OUTDOOR ADVERTISING DISPLAYS</u>. No person shall erect or maintain an outdoor advertising display in the City of Moreno Valley, except in accordance with the provisions contained in this Section 19.3. The changing of an advertising message or customary maintenance of a legally existing display shall

not require a permit pursuant to this section. Before the erection, placement, or installation of any outdoor advertising display proposed after the effective date of this ordinance, the applicant shall first obtain a conditional use permit in accordance with and subject to all provisions in the City's zoning ordinances relating to conditional use permits. Said conditional use permit shall also be subject to the findings that such a display will not have a harmful effect upon the health or welfare of the general public and will not be detrimental to the welfare of the general public and will not be detrimental to the aesthetic quality of the community or the surrounding land uses.

a. LOCATIONAL STANDARDS

(1) Outdoor Advertising Displays and shall be permitted only within the M-M (Medium Manufacturing), M-H (Heavy Manufacturing), and the M-S-C (Service Commercial) Zones and will not be permitted in any other zone.

(2) No outdoor advertising display shall be located within 750 linear feet from any other such display along either side of the same Highway. The distance shall be measured along the side of the Highway on which the already-approved display is located, and the width of the Highway shall not be included in the measurement.

(3) No outdoor advertising display shall be located within 750 linear feet from any other such display along either side of any Highway which intersects the Highway upon which the already-approved display is located. The distance shall first be measured along the side of the Highway upon which the already-approved display is located, and then along the nearest side of the Highway upon which the new display is proposed to be located. In no event shall an outdoor advertising display be located within a 500-foot straight line distance of any other such display which is located on an intersecting Highway.

(4) No display shall be erected within an established setback or building line or within highway right-of-way lines or within future highway right-of-way lines that have been established by a specific plan.

(5) No display shall be affixed on or over the roof of any building, no display shall be affixed to the wall of a building so that it projects above the parapet of the building. For the purposes of this section, a mansard style roof shall be considered a parapet.

b. STRUCTURAL STANDARDS

(1) The maximum surface area of the display shall not exceed 300 square feet.

(2) The maximum height of the display shall not exceed 25 feet. This height limitation may be altered through the conditional use permit process if findings are made that the proposed display will not be harmful to the health, safety, or welfare of the community, and that the display will not have a detrimental effect upon the aesthetic qualities of surrounding properties and developments.

(3) Each outdoor advertising structure shall be limited to one of the following:

a. one sign face,

b. dual sign face if said sign faces are mounted back to back on the same structure, in parallel planes, and not more than four feet apart, or

c. dual sign face if said sign faces are mounted in a "V" configuration on the same support structure and not more than 15 feet apart on the open end.

(4) Each outdoor advertising structure shall be constructed according to a design to be approved through the conditional use permit process. Design of the structure shall be encouraged to have only one support column, beam, post, or pole for the entire structure. More than one support

column may be permitted with findings that such a design will be consistent with the aesthetic qualities and goals of the community.

(5) Each outdoor advertising display shall be required to have a landscaped area at the base of the structure as appropriate. The area to be landscaped shall be equal to or greater than the total square footage of the display areas on all sign faces of the outdoor advertising structure. Said landscaping shall include:

a. a landscaped berm below each sign face, as approved by the Director of Developmental Services,

b. not less than two trees of substantial maturity per sign face of 200 sq. ft. or more,

c. screened plantings and shrubbery of substantial maturity around the base support structure,

d. automatic irrigation, as approved by the Director of Developmental Services, and

e. maintenance of said landscaping, including replacement of plants or trees as determined by the Director of Developmental Services.

Any or all landscaping requirements may be waived by the Director of Developmental Services, based upon findings that a proposed location for an outdoor advertising display is vacant or largely undeveloped, or that landscaping would be inappropriate in that location. If the site of a proposed outdoor advertising display is undeveloped, the Director may condition the display to require landscaping upon development of said property.

c. APPLICATION FOR CONDITIONAL USE PERMIT

(1) Application. No outdoor advertising display shall be erected unless a conditional use permit therefor has been approved. Application for such permit shall be in accordance with Section 18.28 and shall consist of a plot plan, in triplicate, containing the name, address and telephone number of the applicant, and a general description of the property upon which the display is proposed to be placed, and showing the precise location, type and size of the proposed display, design of the structure, property lines and dimensions, location of and distance to nearest existing displays, nearest buildings within 500 feet in each direction, nearby public and private highways and roads and other rights of way, building setback lines and specifically planned future highway right-of-way lines, in such manner that the property and the proposed outdoor advertising display may be readily ascertained and identified. If the applicant holds a permit for such advertising display issued by the State of California, the year and number of the State Permit shall be shown; if such permit has not yet been issued, the applicant shall notify the Director of Developmental Services of its number within 10 days after such State permit is issued. If the Director of Developmental Services determines that the proposed display conforms to the requirements of this ordinance, he shall promptly endorse zoning approval on the three copies of the plot plan, file one copy, return one copy to the applicant which will then be the permit, and forward one copy to the Chief Building Official. No outdoor advertising structure may be constructed until a building permit has been issued by the Building and Safety Department. If the Director of Developmental Services determines that the outdoor advertising display does not conform to the

requirements of this ordinance, he shall notify the applicant, giving his reasons. Once an outdoor advertising display has been approved, the applicant, upon completing the erection of said outdoor advertising display, shall promptly notify the Director of Developmental Services thereof in writing. Fees for the issuance of the permit shall accompany the permit application. Fees shall be established by the City Council.

(2) Procedure for Considering Applications. The procedures set forth in Section 18.26 of this ordinance shall apply to the processing, hearing, considering and appeals relating to any application for an outdoor advertising display.

(3) Revocation. Any permit which has been issued as the result of material misrepresentation of fact by the applicant may be revoked by the Director of Developmental Services who shall thereupon forthwith give written notice of revocation to the applicant. Within ten (10) days thereafter any outdoor advertising display authorized by said permit shall be removed. Failure to remove such display within said ten (10) day period is a violation of this ordinance. Nothing in this ordinance shall be deemed to authorize the installation or maintenance of any outdoor advertising display in violation of any State law or regulation.

d. NON-CONFORMING OUTDOOR ADVERTISING DISPLAYS

(1) Any existing and legally constructed and maintained outdoor advertising display not in conformance with this Article at the time that this amendment takes effect shall become a legal non-conforming outdoor advertising display.

(2) A legal nonconforming outdoor advertising display may not be:

a. changed to another nonconforming outdoor advertising display.

b. structurally altered to extend its useful life.

c. expanded in size or height.

d. Reestablished after damage or destruction of more than fifty percent of its construction value, as determined by the Chief Building Official.

(3) No building permit shall be issued for any structures, building expansions or new building construction on a site which contains a legal nonconforming outdoor advertising display that will not permit said construction or expansion to be in compliance with City Ordinance No. 348.

e. REMOVAL OF LEGAL NON-CONFORMING OUTDOOR ADVERTISING DISPLAYS

All legal non-conforming outdoor advertising displays, meeting the requirements of Sections 5412.1 and 5412.2 of the California Business and Professions Code, shall be removed, without compensation, from the site upon which they are located, in accordance with the following schedule. This schedule shall commence upon the date of written notice of removal requirements:

| Fair Market Value on Date of Notice of Removal Requirement | Minimum Years Allowed |
|---|---|
| Under $1,999 | 2 |
| $2,000 to $3,999 | 3 |
| $4,000 to $5,999 | 4 |
| $6,000 to $7,999 | 5 |
| $8,000 to $9,999 | 6 |
| $10,000 and over | 7 |

The value of a display shall be determined by the Director of Developmental Services in accordance with current Department of Transportation Valuation Schedules, and shall be sent to the owner of said display. Any disagreement of said value shall follow appeal procedures set forth in Section 19.3.c.2 of this Article XIX.

The City may require the removal of any legal non-conforming outdoor advertising display, which cannot otherwise be removed under Sections 5412.1 and 5412.2, 5440, and 5461 of the State Business and Professions Code, provided that payment of compensation is made pursuant to Section 5412 of the State Business and Professions Code, unless payment of compensation is not otherwise required by applicable City Ordinances or by other applicable laws. Compensation will be determined by the Director of Developmental Services based on current Department of Transportation Valuation Schedules.

f. LANDSCAPED FREEWAY

No outdoor advertising display shall be place or maintained on property adjacent to a section of a freeway, which has been landscaped (as defined by Section 5440 of California Business and Professions Code), if the advertising display is designed to be viewed primarily by persons traveling on the main-traveled way of the landscaped freeway. Any non-conforming outdoor advertising display existing adjacent to, and designed to be viewed from, a landscaped freeway, shall not be considered a legal non-conforming outdoor advertising display from the date the freeway has been declared a landscaped freeway by the Director of Public Works of the State of California or the Director's Designee and the character of the freeway has been changed from a freeway, to a landscaped freeway, and shall be subject to removal at the earliest time permitted by law.

g. COMPLIANCE WITH STATE AND LOCAL CODES

All advertising displays which are placed or which exist in violation of the provisions of the State Business and Professions

Code, Federal Highway Act, or City Ordinances, shall be deemed a public nuisance and shall be subject to removal in accordance with applicable laws or regulations.

h. PRIMARY USE

Each outdoor advertising display shall be considered a primary use for the property on which it is located. New construction will be permitted on a parcel, which contains a conforming outdoor advertising display, if findings can be made that the existing display will not prevent development of said construction in accordance with applicable City ordinances, regulations, and policies. In the event a primary use exists on a parcel for which an outdoor advertising display is proposed, such proposal may be approved subject to the findings that the display is compatible with the existing primary use with respect to relative location, relative size, relative bulk, and other similar criteria, and will comply with all applicable City ordinances, regulations, and policies.

SECTION 19.4 ON-SITE ADVERTISING STRUCTURES AND SIGNS. No person shall erect an on-site advertising structure or sign in the City of Moreno Valley that is in violation of the provisions contained within any specific zoning classification in this ordinance that is in violation of the following provisions.

a. FREE-STANDING SIGNS

(1) Located within 660 feet of the nearest edge of a freeway right of way line.

a. the maximum height of sign shall not exceed 45 feet.

b. the maximum surface area of a sign shall not exceed 150 square feet.

(2) All Other Locations.

a. the maximum height of a sign shall not exceed 20 feet.

b. the maximum surface area of a sign shall not exceed 50 square feet.

(3) Shopping Centers - All Locations.

a. the maximum surface area of a sign shall not exceed 50 square feet of .25 percent (1/4 of 1%) of the total existing building floor area in a shopping center, whichever is greater, except that in any event, no sign shall exceed 200 square feet in surface area.

b. the maximum height of a sign shall not exceed 20 feet.

(4) Number of Free-Standing Signs - All locations. Not more than one free-standing sign shall be permitted on a parcel of land, except that if a shopping center has frontage on 2 or more streets, the shopping center shall be permitted 2 free-standing signs, provided that the 2 signs are not located on the same street, are at least 100 feet apart and the second sign does not exceed 100 square feet in surface area and 20 feet in height.

b. SIGNS AFFIXED TO BUILDINGS - ALL AREAS

(1) No on-site advertising sign shall be affixed on, above or over the roof of any building, and no on-site advertising sign shall be affixed to the wall of a building so that it projects above the parapet of the building. For the purposes of this section, a mansard style roof shall be considered a parapet.

(2) The maximum surface area of signs affixed to a building shall be as follows:

a. Front wall of building - The surface area of the sign shall not exceed 10% of the surface are of the front face of the building.

b. Side walls of a building - The surface area of the sign shall not exceed 10% of the surface area of the side face of the building.

c. Rear wall of a building - The surface area of a sign shall not exceed 5% of the surface area of the rear face of the building.

c. DIRECTIONAL SIGNS

Directional signs to advise patrons of location, distance or purpose shall be permitted on a parcel of land as follows:

(1) The maximum height of such signs shall not exceed 3 feet.

(2) The maximum surface area of such signs shall not exceed 6 square feet.

d. ON-SITE IDENTIFICATION SIGNS.

On-site identification signs affixed to the surface of walls, windows, and doors of permanent structures, which do not exceed 4 inches in letter height and do not exceed 4 square feet in area are permitted in addition to any other sign permitted in this ordinance.

SECTION 19.5 FOR SALE, LEASE OR RENT SIGNS. For sale, lease or rent signs shall be permitted to be placed in all zone classifications subject to the following regulations.

a. For one and two family residential uses - one sign not exceeding 4 square feet in surface area and not more than 4 feet in height.

b. For multiple family reisdential uses - one sign for each separate frontage on a street, each sign not to exceed 16 square feet in surface area and not more than 8 feet in height.

c. For commercial uses - one sign for each separate frontage on a street, each sign not to exceed 24 square feet in surface area and not more than 8 feet in height.

d. For industrial uses - one sign for each separate frontage on a street, each sign not to exceed 32 square feet in surface area and not more than 10 feet in height.

e. For agriculture uses - one sign for each separate frontage on a street, each sign not to exceed 16 square feet in surface area and not more than 8 feet in height.

SECTION 19.6 SUBDIVISION SIGNS

a. On-site subdivision signs, advertising the original sale of a subdivision are permitted within the boundaries of a subdivision, upon approval of a plot plan pursuant to Section 18.30 of this ordinance and subject to the following minimum standards:

(1) No sign shall exceed 100 square feet in area.

(2) No sign shall be within 100 feet of any existing residence that is outside of the subdivision boundaries.

(3) No more than two such signs shall be permitted for each subdivision.

(4) No sign shall be artificially lighted.

(5) No sign shall be within ten (10) feet of a public street right-of-way."

SECTION 2. SEVERABILITY:

2.1 It is the intention of the City Council in adopting this ordinance that each provision, section, sentence, clause and phrase shall be given effect and enforced to the extent legally possible without regard to whether any other provision, section, sentence, clause or phrase is found to be invalid or unenforceable.

SECTION 3. POSTING:

3.1 The City Clerk shall certify to the adoption of this ordinance and, as so certified, shall post copies hereof in three public places within the City of Moreno Valley as heretofore established by resolution of the City Council

ADOPTED by the City Council and signed by the Mayor and attested by the City Clerk this 9th day of June, 1987.

APPENDIX C -- DISTRICT COURT ORDER

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

| | |
|---|---|
| DESERT OUTDOOR ADVERTISING INC., et al.,<br>Plaintiffs,<br>v.<br>THE CITY OF MORENO VALLEY, et al.,<br>Defendants. | CV 88-3689 TJH (Kx)<br><br>ORDER |

The Court has considered Smith, Rodriguez, Strom and Garcia's motion for judgment on the pleadings, Defendants' motion for summary judgment, and Plaintiffs' motion for summary judgment, or, in the alternative, for summary adjudication of the issues, together with the moving and opposing papers.

*It is Ordered* that Smith, Rodriguez, Strom and Garcia's motion for judgment on the pleadings be, and hereby is, *Granted.*

*It is further Ordered* that Defendants' motion for summary judgment be, and hereby is, *Granted.*

*It is further Ordered* that Plaintiffs' motion for summary judgment or, in the alternative, for summary adjudication of the issues, be, and hereby is, *Denied.*

Date: March 13, 1995 /s/

Terry J. Hatter, Jr.
United States District Judge

No. 96101497 (2)

Supreme Court, U.S.
FILED
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CLERK

In The

# Supreme Court of the United States

October Term, 1996

THE CITY OF MORENO VALLEY; FRANK GARCIA; QUENTIN K. STROM; ANDREW RODRIGUEZ; RON SMITH,

*Petitioners,*

*vs.*

DESERT OUTDOOR ADVERTISING, INC. AND OUTDOOR MEDIA GROUP, INC.,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.*

## RESPONDENTS' BRIEF IN OPPOSITION

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## EDITOR'S NOTE

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## QUESTIONS PRESENTED FOR REVIEW

Respondents Desert Outdoor Advertising, Inc. and Outdoor Media Group, Inc. ("Respondents") do not accept Petitioners' statement of the questions that would be presented for review if the petition for certiorari were granted. Respondents respectfully submit that the questions that would be presented would be the following:

I. Whether billboard operators have standing to challenge the constitutionality of a city sign ordinance where (a) the city brings enforcement proceedings against the operators to force removal of their signs; (b) the operators' injury is directly traceable to the city's adoption and enforcement of the ordinance and (c) a declaration that the ordinance is unconstitutional would likely redress the operators' injury by allowing them to maintain their signs.

II. Whether billboard operators must obtain a conditional use permit for their signs under a local sign ordinance where (a) the permit requirement only applies to signs that carry certain messages, including political messages; and (b) city officials may deny a permit on grounds of "a harmful effect upon the health or welfare of the general public" or detriment "to the aesthetic quality of the community."

III. Whether a sign ordinance violates the First Amendment with respect to commercial

speech where (a) it contains no statement of purpose showing that it is enacted to further a substantial governmental interest; and (b) no evidence is produced to show that the ordinance's sign restrictions further such an interest.

IV. Whether a sign ordinance violates the First Amendment with respect to non commercial speech where it (a) allows signs bearing commercial messages in zones where signs that bear political and other noncommercial messages are excluded; and (b) exempts from any regulation under the ordinance certain kinds of noncommercial messages on the basis of content.

V. Whether the unconstitutional portions of a local sign ordinance should be severed where those portions are (a) the permit requirement; (b) the regulations relating to commercial signs; and (c) the regulations relating to noncommercial signs.

VI. Whether city employees who were involved in enforcing the ordinance are entitled to qualified immunity, where the ordinance violates clearly established constitutional rights as articulated in opinions of this Court.

Respondents submit that this Court has definitively decided each of these questions and that in issuing its opinion in this case, the Ninth Circuit Court of Appeals correctly applied this Court's decisions.

# TABLE OF CONTENTS

*Page*

QUESTIONS PRESENTED FOR REVIEW ..... i
TABLE OF CONTENTS ..... ii
TABLE OF AUTHORITIES ..... iii
RESPONDENTS' BRIEF IN OPPOSITION ..... 1
STATEMENT OF JURISDICTION ..... 2
STATEMENT OF THE CASE ..... 3
A. HISTORY OF THE LITIGATION ..... 3
B. CORRECTION OF MISSTATEMENTS IN THE PETITION ..... 5
1. Misrepresentations Concerning the Permit Requirement ..... 5
2. Misrepresentations Concerning the Sign Regulations ..... 5
REASONS FOR DENYING THE PETITION ..... 13
I. HOW THE ORDINANCE WORKS ..... 13
II. THE PERMIT REQUIREMENT IS BASED ON UNCONSTITUTIONALLY VAGUE "STANDARDS" ..... 15
III. THE ORDINANCE FAILS THE *CENTRAL HUDSON* TEST AS TO COMMERCIAL SPEECH ..... 16
IV. THE ORDINANCE IS CONSTITUTIONAL AS TO NONCOMMERCIAL SPEECH ..... 17
V. THE NINTH CIRCUIT PROPERLY HELD THE WHOLE ORDINANCE UNCONSTITUTIONAL ..... 18

*Page*

VI. THE NINTH CIRCUIT PROPERLY HELD THAT QUALIFIED IMMUNITY WAS NOT AVAILABLE TO THE INDIVIDUAL DEFENDANTS ..... 18

CONCLUSION ..... 19

CERTIFICATE OF SERVICE ..... 20

# TABLE OF AUTHORITIES

*Page*

## Cases

Abend v. MCA, Inc., 863 F.2d 1465, (9th Cir. 1988), affirmed sub nom. Stewart v. Abend, 495 U.S. 807,116 S.Ct. 1750 (1990) ..... 8

Board of Trustees of the State University of New York v. Fox, 492 U.S. 469,109 S.Ct. 3028 (1989) ..... 9

Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 103 S.Ct. 2875 (1983) ..... 9

Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 100 S.Ct. 2343 (1980) ..... 9,16

City of Ladue v. Gilleo, 512 U.S. 43, 114 S.Ct. 2038 (1994) ..... 14

City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 108 S. Ct. 2138 (1938) ..... 15

Harlow v. Fitzgerald, 457 U.S., 800, 102 S.Ct. 2727 (1982) ..... 18

Metromedia Inc. v. City of San Diego, 453 U.S. 490, 101 S.Ct. 2882 (1981) 8,10, ..... 11,17

Railroad Commission of Texas v. Pullman Co., 312 U.S 496, 61 S.Ct. 643 (1941) ..... 4

Rubin v. Coors Brewing Co., 514 U.S 476,115 S.Ct. 1585 (1995) ..... 9

Shuttlesworth v. City of Birmingham, 394 U.S. 147, 89 S.Ct. 935 (1969) ..... 7, 15

*Page*

**Younger v. Harris, 401 U.S. 33, 91 S.Ct. 746 (1971)** ..... 3

**Statutes**

**28 U.S.C. § 1254(1)** ..... 2

**28 U.S.C. § 1291** ..... 2

**28 U.S.C. § 1331** ..... 2

**28 U.S.C. § 1343** ..... 2

**42 U.S.C. § 1983** ..... 2

No. 96101497

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In The

# Supreme Court of the United States

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October Term, 1996

THE CITY OF MORENO VALLEY; FRANK GARCIA; QUENTIN K. STROM; ANDREW RODRIGUEZ; RON SMITH,

*Petitioners,*

*vs.*

DESERT OUTDOOR ADVERTISING, INC. AND OUTDOOR MEDIA GROUP, INC.,

*Respondent.*

## RESPONDENTS' BRIEF IN OPPOSITION

**Respondents Desert Outdoor Advertising, Inc. and Outdoor Media Group, Inc. ("Respondents") respectfully urge the Court to deny the petition for writ of certiorari seeking review of an opinion of the United States Court of Appeals for the Ninth Circuit. The opinion of the Court of Appeals is reported at 103 F. 3d 814 (9th Cir. 1996). (For the convenience of the Court, all reference to the opinion herein will be to the slip opinion attached to the petition as Exhibit A.)**

## STATEMENT OF JURISDICTION

**This action was commenced in the United States District Court for the Central District of California. Pursuant to 28 U.S.C. §§ 1331 and 1343, the district court had jurisdiction over Petitioners' civil rights claims, brought pursuant to 42 U.S.C. § 1983, for violation of Petitioners' rights under the First and Fifth Amendments of the United States Constitution. The Court of Appeals had jurisdiction to review the district court's order granting Petitioners' motions for summary judgment and judgment on the pleadings and denying Respondents' motion for summary judgment, pursuant to 28 U.S.C. § 1291. The Court now has jurisdiction over the petition for writ of certiorari pursuant to 28 U.S.C. § 1254(1).**

## STATEMENT OF THE CASE

### A. HISTORY OF THE LITIGATION

This litigation involves two signs within the City of Moreno Valley ("the City"). Respondent Desert Outdoor Advertising, Inc. ("Desert") owns one of the signs and Respondent Outdoor Media Group ("OMG") owns the other, The Desert sign was built on or about March 1, 1986 on land not then within the City limits. By a resolution that took effect December 1, 1987, the City annexed the site of Desert's sign. The OMG sign was built in or about May, 1988, within the City limits. The City's sign ordinance ("The Ordinance (§19.3 a (1)) forbids the placement of an outdoor advertising display in the zones where the two signs are located. Neither Desert nor OMG submitted to the City's permit requirement by applying for a conditional use permit for either sign.

This litigation began on February 22, 1988, when the City sued Desert in state court to compel removal of Desert's sign on the grounds that it violated the Ordinance's zoning restrictions. On June 28, 1988, Desert and OMG filed the present action in federal court, alleging that the Ordinance's permit requirement and its zoning prohibitions on Respondents' signs violated the First and Fifth Amendments, as well as the California Constitution and other provisions of state law. The City responded with an action brought in state court on December 16, 1988, which sought removal of the OMG sign on the grounds that it too violated the Ordinance.

On or about March 24, 1989, Petitioners moved to dismiss the federal action on *Younger v. Harris*, 401 U.S. 33, 91 S.Ct. 746 (1971) grounds. Over Respondents'

opposition, the district court abstained pursuant to *Railroad Commission of Texas v. Pullman Co.*, 312 U.S 496, 61 S.Ct. 643 (1941). After initially dismissing the case, the court by order of July 14, 1989 stayed the action pending resolution of Respondents' state-law claims in state court. The district court reserved jurisdiction over Respondents' federal constitutional claims.

Four years of litigation in the state courts ensued. During that litigation, Petitioners sought summary judgment on Petitioners' federal constitutional claims. Respondents were forced to obtain a preliminary injunction on January 25, 1991, to preserve their right to litigate their federal claims in federal court.

Respondents viewed the local state court as a forum hostile to their constitutional claims. Concerned about the potential *res judicata* effects of an adverse judgment on their state constitutional claims, Respondents voluntarily dismissed them. With only Respondents' non-constitutional claims under state law remaining, the action proceeded to judgment in the state court. On or about June 12, 1991, the City obtained a judgment against OMG on the remaining state law issues. On or about July 25, 1991, the City obtained a judgment against Desert. OMG unsuccessfully appealed the judgment. On or about June 3, 1993, the City filed a notice of conclusion of the state court proceedings.

Pretrial proceedings and cross-motions for summary judgment ensued in the federal action. On or about November 4, 1994, the City moved for summary judgment on Respondents' constitutional claims. The individual Petitioners also moved for judgment on the pleadings on the grounds of qualified immunity.

Respondents opposed the motion and filed a cross-motion for summary judgment on or about December 23, 1994. By order of March 16, 1995, the district court granted Petitioners' motions and denied Respondents'. The district court's order (Petition, Appendix C) contained no statement of the district court's reasoning. The district court later refused to provide such a statement in response to a motion Respondents brought during the appeal.

Respondents timely appealed from the district court's order. In an opinion dated December 20, 1996, the Ninth Circuit reversed the district court's judgment and held the Ordinance unconstitutional in its entirety.

## B. CORRECTION OF MISSTATEMENTS IN THE PETITION

### 1. *Misrepresentations Concerning the Permit Requirement*

Petitioners assert (Petition at 5-6) that the permit requirement is content-neutral and that it is not a restriction on speech at all. These assertions are false. Section 19.3 c (1) of the Ordinance (Appendix at B-7) requires a permit for the construction of an "outdoor advertising display" ("Display"). Section 19.2 a. of the Ordinance defines a Display as an outdoor advertising sign or structure "*used for the display of political messages and the promotion of products, goods, services or business establishments not conducted, manufactured, or sold upon the premises where the [D]isplay is located.*" (Emphasis added.) The Ordinance thus defines a Display as an outdoor advertising sign or structure that bears a political

or other "off-premise" message. The permit requirement is clearly based on speech.

The above discussion disposes of Petitioners' false assertion (Petition at 6) that the permit requirement is somehow analogous to a content-neutral building permit for a theater or a church. Petitioners' analogy fails because the Ordinance does not require a permit for every outdoor advertising sign or structure (*See* Ordinance, § 19.2 b., c., Appendix at B-2), but only for Displays (§19.3 a.), *i.e.*, signs or structures that bear political or other off-premise messages. An analogous requirement for a theater or church would require a permit for a theater that shows certain kinds of films or a church of a specified denomination.

Petitioners falsely seek (Petition at 5-6) to bootstrap this defect in the permit requirement into a criticism of the Ninth Circuit's opinion. According to Petitioners, a sign is necessarily without content at the time it is built. Therefore, they argue, the Ninth Circuit erred in finding the permit requirement content-based. As shown above, however, the permit requirement is content-based on its face, In practical terms, a prospective builder of a sign would have to consider whether she intended the proposed sign to carry a political or other message that would make the sign a Display, and decide accordingly whether to apply for a permit. Otherwise, the Sign owner would face the prospect that the permit requirement could be retroactively enforced against an unpermitted sign that bore the kind of message that would make it a Display. These effects follow from the Ordinance's selective imposition of a permit requirement on signs that bear disfavored messages. They are not reflective of any deficiencies in the Ninth Circuit's

opinion.

Petitioners also falsely assert (Petition at 5-6) that the Ninth Circuit engaged in an "eccentric" analysis of the permit requirement in finding that it vested unbridled discretion in City officials. This purported eccentricity stems from the Ninth Circuit's taking seriously the language of § 19.3 (Appendix at B-4) that subjects a permit application to such nebulous criteria as "welfare of the general public." In § 19.3 (Appendix at B-4), the ordinance requires a permit for the erection of a Display, "subject to all provisions in the City's zoning ordinances relating to conditional use permits." The ordinance then provides:

> "Said conditional use permit shall *also* be subject to the findings that such a display will not have a harmful effect upon the *health or welfare of the general public and will not be detrimental to the aesthetic quality of the community or the surrounding land uses.*" (Emphasis added.)

By using the word "also," the Ordinance makes unmistakably clear that the City could deny a conditional use permit for a Display on such vague grounds as "welfare of the general public" and "aesthetic quality of the community." Petitioners, however, ignore the plain language of the Ordinance and attempt to minimize it as part of a mere "prefatory" paragraph. Petitioners thus maintain that some language of the Ordinance (*i.e.*, that which hurts their case) should not be taken seriously, "Prefatory"' or not, the above language is much the same as the permit "standards" this Court held unconstitutional in *Shuttlesworth v. City of*

*Birmingham*, 394 U.S. 147, 89 S.Ct. 935 (1969).

### 2. *Misrepresentations Concerning the Sign Retaliations*

Petitioners falsely assert (Petition at 8) that the Ninth Circuit somehow held that a municipality may not post weed abatement or traffic signs "without opening itself up to unlimited numbers of billboards, signs, posters and the like. That is by no means what the Ninth Circuit held. In its opinion (Appendix at A-13-14), the court held that the City could not ban signs bearing political and other noncommercial messages from certain zones while allowing signs bearing other noncommercial messages in such zones. The Ninth Circuit's holding fully comports with this Court's pronouncements that a city is not free to pick and choose among noncommercial messages on the basis of content. *Metromedia Inc. v. City of San Diego,* 453 U.S. 490, 515, 101 S.Ct. 2882 (1981) ("With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse.")

The City erroneously argues (Petition at 8) that only the district court's granting of Petitioners' motions, and not the denial of Respondents' motion for summary judgment, was raised on appeal. This assertion is false. Respondents appealed from the district court's final order of March 16, 1995 (Appendix at C-1), which included both the granting of Petitioners' motions and the denial of Respondents'. *See Abend v. MCA, Inc.*, 863 F.2d 1465, 1482 n. 20 (9th Cir. 1988), *affirmed sub nom. Stewart v. Abend,* 495 U.S. 807,110 S.Ct. 1750 (1990).

The City failed to adduce any evidence that the Ordinance's content-based restrictions on commercial

Displays (i.e., signs that bear political or other off-site commercial messages) actually advance its claimed interests in safety and aesthetics. This Court has recognized that a governmental entity must affirmatively justify content-based restrictions on commercial speech. *Rubin v. Coors Brewing Co.*, 514 U.S 476,115 S.Ct. 1585, 1591 (1995); *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469,480,109 S.Ct. 3028 (1989); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n. 20, 103 S.Ct. 2875 (1983). In line with the above authorities, the Ninth Circuit required the City to produce evidence that the Ordinance's restrictions on commercial speech furthered the substantial governmental interests the City sought to invoke in its court filings. The City failed to produce any such evidence and the Ninth Circuit accordingly held that the Ordinance failed the second prong of the test articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S.Ct. 2343 (1980).

Petitioners falsely assert (Petition at 9) that evidence to justify the Ordinance's content-based restrictions on commercial speech "cannot possibly exist" because of Respondents' two signs. According to Petitioners, the efficacy of the sign restrictions cannot be tested because Respondents' two signs "were never removed," thereby making it "impossible for anyone to know what the effect of the law would have been had it been observed." In other words, the existence of Petitioners' two signs made it impossible to develop evidence --anywhere in the world-- showing the efficacy of the City's sign restrictions.

The City's position is absurd. If the restrictions actually promoted safety or aesthetics, the City could

have submitted expert testimony or other evidence showing that they did so. Petitioners may be right that such evidence does not exist, but the reason it does not exist is that the Ordinance's arbitrary, content-based restrictions bear no relationship to any legitimate governmental interest.

Petitioners also misstate (Petition at 9-11) the Ninth Circuit's decision in regard to noncommercial speech. According to Petitioners (*id.* at 9), this Court in *Metromedia* held that a City could regulate "billboards" or ban them altogether without reference to the way in which it regulated other signage. This statement is false. The *Metromedia* majority held the City's ban on noncommercial billboards unconstitutional because the city permitted on-site commercial signs, thereby preferring commercial over noncommercial speech. *Id.*, 453 U.S. at 512-517.

Petitioners' use of the term "billboards" is also misleading in the context of the Ordinance. The Ordinance does not purport to regulate "billboards". It regulates Displays and other categories of signs, most of which are defined in § 19.2. Nowhere in these definitions does the term "billboard" even appear. In invalidating the Ordinance, the Ninth Circuit did not address "billboards," except to the extent that signs commonly thought of as billboards are encompassed by the regulatory categories defined in the Ordinance.

In a confusing discussion (Petition at 10-11), Petitioners assert that the Ordinance does not restrict political signs and other Displays more than it restricts On-Site Signs (*See* §§ 19.2e. (erroneously typed "3"), 19.4). The Ordinance, they argue, allows Displays to be

larger than On-Site Signs. Respondents' only "violations" of the Ordinance (as reflected in ¶ 5 F. of the pretrial order), however, were the placement of their signs in zones where Displays were forbidden and their failure to obtain City permits. The issue before the Ninth Circuit therefore was whether the Ordinance's zoning restrictions and permit requirements violated the First Amendment. The Ordinance, which allows commercial on-site signs of a limited size in all commercial zones but forbids political signs of any size to be placed in some of those zones, is unconstitutional under *Metromedia*, 453 U.S. at 512.

With respect to the qualified immunity issue, Petitioners again misstate the record. Petitioners assert (Petition at 14) that it was somehow stipulated that the individual Petitioners had only sought to enforce the Ordinance by filing court actions. Nowhere in ¶ 5, the "stipulated facts" section of the pretrial order, is any such fact stated. Moreover, in ¶¶ U.-BB. of the pretrial order, Respondents sought to raise numerous issues regarding enforcement of the Ordinance, including coercion by the City; attempts to have Respondents' state permits for the subject signs revoked; intimidation and harassment of Respondents by City personnel; repeated sending of violation notices by City personnel; threats of criminal prosecution; attempts to promulgate and enforce an illegal ordinance; whether Petitioner interfered with Respondents' contractual and prospective business relations; and whether Petitioners defamed Respondents. Similar allegations were contained in ¶ 16 of the complaint.[1]

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[1] In ¶ 16, Respondents alleged that Petitioners had engaged in a campaign of coercion against Respondents. "Such conduct," Respondents alleged, "includes . . . issuance of notices of violation, the threat of criminal and civil

Petitioners disputed whether the above issues were properly in the case, but Respondents quite clearly sought to raise them at trial. Contrary to petitioners' misstatement of the record, therefore, the parties had by no means "stipulated' that the only enforcement vehicle had been the filing of lawsuits.

Petitioners also misstate the record when they assert (Petition at 15) that "judicial officers" have not found that the Ordinance vests "unbridled discretion" in City officials to issue a permit. Only one "judicial officer," who refused a direct request for a statement of his reasoning, held in favor of the individual Petitioners' qualified immunity defense. The issue was not even presented to the state courts. Three "judicial officers" on the Ninth Circuit Court of Appeals, who stated in detail the basis for their conclusion, held that the permit requirement does vest unbridled discretion on City officials.

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prosecution., initiation of a civil action regarding the Desert Sign, and attempted interference," with Respondents' contracts "through the use of threats, intimidation, and other wrongful conduct."

## REASONS FOR DENYING THE PETITION

### I.

### HOW THE ORDINANCE WORKS

The petition should be denied because the Ninth Circuit decided this case correctly and did so well within the bounds of this Court's prior decisions. The fundamental characteristic of the Ordinance is that it regulates signs on the basis of content. The sign categories the Ordinance regulates have content built into their very definitions The Ordinance's most basic definitions are those of "Outdoor Advertising Sign" and "Outdoor Advertising Structure" set forth in § 19.2 b. and c. These definitions are stated in physical terms. The content-based definitions are built on these physical ones.

As discussed above, a Display is defined (§ 19.2 a.) as an outdoor advertising sign or structure used to display a political or other off-premise message. Similarly, § 19.2 d. defines four categories of exempt signs ("Exempt Signs") in terms of the messages the signs convey. Section 19.2 e. defines "On-Site Advertising Structures and Signs" as structures and signs that bear a message relating to "goods sold, business conducted or services rendered on the parcel of land upon which the sign is located." Section 19.2 1. defines a "For Sale" sign as a sign "advertising that the property or structure upon which the sign is located is for sale, lease or rent."

Each of the above categories is based on the content of the message the sign conveys. For example, if a sign states "Smith's Grocery" on the site of a grocery store, it is an On-Site Sign, but if it reads "Smith for

Mayor," it is a Display.

Having defined its regulatory categories, the Ordinance then subjects them to various zoning restrictions. The strictest zoning regulations are imposed on Displays, i.e. signs and structures used for political or off-site messages. Section 19.3 a. (1) restricts Displays to three heavy industrial and commercial zones. Section 19.3 (Appendix at B-4, B-7) also requires a conditional use permit for Displays only.

On-Site Signs are subjected to less strict regulation. In discovery, Petitioners admitted that such signs are allowed in all commercial areas of the City (not just the three where Displays are allowed), and that 95% of such signs bear commercial messages. Section 19.5 provides that For Sale Signs are allowed not just in the three zones open to Displays, but "in all zone classifications" subject to size and number regulations. An undefined sign category, Subdivision Signs (§ 19.6), is allowed "within the boundaries of a subdivision," presumably within residential zones where political signs and other Displays are forbidden. From the above it is clear that the Ordinance regulates signs on the basis of content. This fact is of fundamental importance in evaluating its constitutionality. *See City of Ladue v. Gilleo, 512* U.S. 43, 114 S,Ct 2038 (1994) (O'Connor, J., concurring).

## II.

## THE PERMIT REQUIREMENT IS BASED ON UNCONSTITUTIONALLY VAGUE "STANDARDS"

**The Ordinance's permit requirement only applies to Displays (§ 19.3, 19.3 c.). Since the definition of Displays is content-based, so is the permit requirement. Further, as shown above, § 419.3 allows the City to deny a permit on the basis of such subjective and amorphous standards as "the welfare of the general public" and "the aesthetic quality of the community." Such non-standards are unconstitutional under the line of cases including *Shuttlesworth,* 394 at 150-151 and *City of Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750, 108 S. Ct. 2138 (1938). The Ninth Circuit thus applied the right legal standard to the permit requirement and reached the right result. There is nothing to be gained in this Court's granting certiorari with respect to this issue.**

## III.

## THE ORDINANCE FAILS THE *CENTRAL HUDSON* TEST AS TO COMMERCIAL SPEECH

**The Ninth Circuit applied the well-known test for regulation of commercial speech that this Court articulated in *Central Hudson*. The court reasoned that the Ordinance lacked a statement of purpose that would allow the City to show that it adopted the Ordinance to further a substantial governmental interest. The City further failed to present any evidence that the Ordinance promoted such interests. The Ninth Circuit relied on the relevant decisions of this Court (Appendix at A-10). The court therefore applied the correct rule of law and reached the proper result. As this Court's Rule 10 makes clear, certiorari is rarely granted to review even an erroneous application of the right legal standard. Certiorari should not be granted to review the Ninth Circuit's correct application of the proper legal standard.**

## IV.

## THE ORDINANCE IS UNCONSTITUTIONAL AS TO NONCOMMERCIAL SPEECH

As shown above, the Ordinance restricts Displays, *i.e.*, signs that bear political or off-site messages, to only three zones. As also shown above, that restriction is based on content. Further, the Ordinance exempts four categories of signs from any restrictions, based solely on the content of the message such signs carry (§ 19.2d, Appendix at B-2). Such content-based regulation of noncommercial speech is unconstitutional under *Metromedia*, 453 U.S. at 513-514.

Equally unconstitutional is the Ordinance's placing greater zoning restrictions (three zones only) on political and other noncommercial Displays, while allowing commercial On-Site Signs in all commercial zones and allowing commercial For Sale Signs throughout the City. *Metromedia*, 453 U.S. at 513.

The Ninth Circuit's holding with respect to noncommercial speech thus reflects a straightforward application of the governing decision of this Court. Again, nothing would be gained by granting certiorari to review the Ninth Circuit's decision.

## V.

## THE NINTH CIRCUIT PROPERLY HELD THE WHOLE ORDINANCE UNCONSTITUTIONAL

**The Ninth Circuit applied the rule that generally, only the unconstitutional part of a statute should be invalidated and the rest should be left intact. (Appendix at A-14.). But having held unconstitutional the permit requirement, the commercial and non-commercial sign regulations and the content-based exemptions, the court faced an ordinance that had been left without any significant regulatory provisions intact. Under these circumstances it was entirely appropriate for the court to invalidate the whole Ordinance. Again, the Ninth Circuit applied the proper legal rule and reached the right result. To grant certiorari with respect to the severance issue therefore would be pointless.**

## VI.

## THE NINTH CIRCUIT PROPERLY HELD THAT QUALIFIED IMMUNITY WAS NOT AVAILABLE TO THE INDIVIDUAL DEFENDANTS

**In holding that the individual Petitioners are not entitled to qualified immunity, the Ninth Circuit applied the correct legal standard, as articulated by this Court in *Harlow v. Fitzgerald*, 457 U.S., 800, 102 S.Ct. 2727 (1982). The court reasoned that, in attempting to enforce the Ordinance, the individual Petitioners had acted in contravention of established law and thus were not entitled to qualified immunity. The court's reasoning and result were correct, Again, no point would be served by granting certiorari to review this issue.**

## CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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April 21, 1997

Certificate of Service

Herewith are 40 copies of the Respondents' Brief in Opposition in No. 96101497

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In The

# Supreme Court of the United States

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October Term, 1996

THE CITY OF MORENO VALLEY; FRANK GARCIA; QUENTIN K. STROM; ANDREW RODRIGUEZ; RON SMITH,

*Petitioners,*

*vs.*

DESERT OUTDOOR ADVERTISING, INC. AND OUTDOOR MEDIA GROUP, INC.,

*Respondent.*

I hereby certify that I am this day serving the foregoing document (3) copies upon the person(s) and in the manner indicated below. Service by first-class mail addressed as follows:

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(3)

No. 96-1497

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*vs.*

DESERT OUTDOOR ADVERTISING, INC. and OUTDOOR MEDIA GROUP, INC.,

*Respondents.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

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80 pp

## TABLE OF CONTENTS

Page

I. THE BILLBOARD OPERATORS ACKNOWLEDGE THAT THERE ARE ISSUES PRESENTED FOR REVIEW ON *CERTIORARI* ..... 1

A. The billboard operators agree that this Court should decide whether a City must prove the efficacy of its billboard regulations ..... 1

B. The billboard operators agree that this Court should decide the proper scope of severability ..... 3

C. The billboard operators agree that this Court should decide whether exemptions of specific categories of signage render a billboard ordinance unconstitutional. ..... 3

D. The billboard operators agree that this Court should decide whether issuance of a conditional use permit may be conditioned on esthetic and safety standards ..... 4

II. THE BILLBOARD OPERATORS MISSTATE THE PROCEDURAL HISTORY OF THE CASE ..... 5

III. WHAT THE BILLBOARD OPERATORS HAVE CHARACTERIZED AS "MISSTATEMENTS" ARE, AT MOST, DIFFERENCES OF INTERPRETATION ..... 6

Page

IV. THE BILLBOARD OPERATORS SEEK TO MISLEAD THIS COURT CONCERNING HOW THE ORDINANCE WORKS ..... 10

V. A CITY DOES NOT HAVE TO PROVE THAT ITS ORDINANCES ACTUALLY ENHANCE SAFETY AND ESTHETICS ..... 11

VI. THIS COURT HAS RECOGNIZED THE REGULATION OF BILLBOARDS TO BE *SUI GENERIS* ..... 12

VII. AN ACCURATE STATEMENT OF THE CASE SHOWS THAT THE INDIVIDUAL EMPLOYEES ARE ENTITLED TO QUALIFIED IMMUNITY ..... 14

VIII. CONCLUSION ..... 16

## TABLE OF AUTHORITIES

Page

**Cases Cited:**

*Ackerley Comunications of the Northwest, Inc.,*
*v. Krochalis*, 108 F.3d 1095 (9th Cir. 1997) .... 1, 2, 11, 12, 13

*Dills v. City of Marietta*, 674 F.2d 1377 (11th Cir. 1982),
*cert. den.* 461 U.S. 905 (1983) ..... 13-14

*Georgia Outdoor Advertising v. City of Waynesville*
833 F.2d 43 (4th Cir. 1987) ..... 2

*Metromedia, Inc., v. City of San Diego*
453 U.S. 490 (1981) ..... 2, 8, 12, 13

*National Advertising Co. v. Town of Babylon*
900 F.2d 551 (2d Cir. 1990),
*cert. den.* 498 U.S. 852 (1990) ..... 13

*Outdoor Graphics, Inc., v. City of Burlington*
103 F.3d 690 (8th Cir. 1996) ..... 2

*Railroad Comm'n of Texas v. Pullman Co.*
312 U.S. 496 (1941) ..... 5

*Shuttlesworth v. City of Birmingham*
394 U.S. 147 (1969) ..... 8

*Younger v. Harris*, 401 U.S. 33 (1971) ..... 5

**California Statutes Cited:**

BUSINESS AND PROFESSIONS CODE §§5200 *et seq.* ..... 7

# I
# THE BILLBOARD OPERATORS ACKNOWLEDGE THAT THERE ARE ISSUES PRESENTED FOR REVIEW ON *CERTIORARI*

A. The billboard operators agree that this Court should decide whether a City must prove the efficacy of its billboard regulations.

The respondents do not contend that the Petition for a Writ of Certiorari does not present issues for review; they merely suggest that the questions should be rephrased so that, rather than being stated in a neutral fashion, the questions imply answers favorable to the respondents' position. The respondents even propose that this case presents additional issues for review by this Court.

Of particular interest is the respondent's Issue for Review number III(b): whether a sign ordinance violates the First Amendment with respect to commercial speech where no evidence is produced to show that the ordinance's sign restrictions further a substantial government interest. It is clear that the respondents believe that the Ninth Circuit, in the instant case, has (and ought to have) answered that question in the affirmative.

On this issue, the Ninth Circuit is not only in conflict with this Court, and with several other Courts of Appeals, but even with itself. In March 1997, the Ninth Circuit decided *Ackerley Communications of the Northwest, Inc., v. Krochalis*, 108 F.3d 1095 (9th Cir. 1997). In that case, the appellate court held that, "as a matter of law [a city's] ordinance, enacted to further the city's interest in esthetics and safety, is a constitutional restriction on commercial speech without detailed proof that the billboard regulation will in fact advance the city's interests." *Id.* at 1099-1100.

Like the billboard operators in the instant case, the billboard operator in the *Ackerley* case contended that a municipality must make a "factual showing that the ordinance advances its goals to a material degree." *Id.* at 1097. The district court held, on the basis of this Court's opinion in *Metromedia v. City of San Diego*, 453 U.S. 490 (1981), no such proof was necessary. *Ackerley*, *loc cit.* The Court of Appeals agreed. *Id.* at 1099.

It is virtually impossible to square the *Ackerley* decision with that in the instant case. In the *Ackerley* opinion, the Ninth Circuit stated that what it had done in the instant case was to overturn "summary judgment in favor of city that made no effort to show that it enacted its billboard ordinance to further any interest in esthetics or safety." *Id.* But that line hardly gives an accurate depiction of what happened in the instant case.

For one thing, the Court of Appeals in the case at bar actually quoted, in its opinion, language from the City's ordinance showing that the purpose of the ordinance was to regulate billboards in the interest of esthetics and safety. Petition, Appendix A, page A-9.

More importantly, however, after *Metromedia*, billboard regulation is *sui generis*. *Metromedia* recognized, as a matter of law, that billboards constitute esthetic blights and safety hazards, and, on the basis of *Metromedia*, municipal regulation of billboards—as such— has been recognized as constitutionally permissible. This has been recognized in other circuits; and, in *Ackerley*, has now been recognized in the Ninth Circuit as well. *See Outdoor Graphics, Inc., v. City of Burlington*, 103 F.3d 690, 695 (8th Cir. 1996) ; *see Georgia Outdoor Advertising v. City of Waynesville*, 833 F.2d 43, 46 (4th Cir. 1987).

B. The billboard operators agree that this Court should decide the proper scope of severability.

The billboard operators have agreed with the City that the issue of severability should be reviewed. In its statement of the issue in its Petition, the City asked the Court to review whether effect should be given to a severability clause when certain regulations (permits, zoning) were held unconstitutional, but other regulations (height, size, spacing, landscaping) were not held unconstitutional. The billboard operators, as their issue V, state the matter somewhat differently; but, at bottom, the issue is identical despite the difference in words.

The billboard operators, of course, misstate (because they overstate) the holding of the Court of Appeals. The Court of Appeals did not find that "*the* regulations relating to commercial . . . [and] noncommercial signs" violated the First Amendment, but that *some* of the regulations relating to signs violated the First Amendment. Specifically, the Court of Appeals found that the zoning and permit regulations violated the First Amendment, and, on that basis, it declared an entire ordinance invalid, including height restrictions, size limitations, spacing mandates, and landscaping requirements, among other things.

C. The billboard operators agree that this Court should decide whether exemptions of specific categories of signage render a billboard ordinance unconstitutional.

The billboard operators have agreed with the City that the scope of permissible exemptions from billboard regulations of general applicability needs to be decided by this Court. The exemptions that the Ninth Circuit found objectionable are those at section 19.2(d) of City of Moreno Valley Ordinance number 133. Petition, Appendix B, page B-2.

The City, in its statement of the issues presented, refers to the exemptions as "such postings as official notices and directional and informational signs." Petition, page I, at issue II. The billboard operators refer to the exemptions as "certain kinds of noncommercial messages" exempted "on the basis of content." Respondents' Brief, page ii, at issue IV(b). The Court may easily determine which, if either, of these characterizations is the more accurate. What is important is that both the City and the billboard operators agree that this is an issue presented for review.

D. The billboard operators agree that this Court should decide whether issuance of a conditional use permit may be conditioned on esthetic and safety standards.

The billboard operators assert that this case presents the issue whether "billboard operators must obtain a conditional use permit for their signs under a local sign ordinance." Respondents' Brief, page i, issue II. This is essentially the same issue that the petitioners put before the Court. Petition, page i, issue III.

The particular manner in which the City of Moreno Valley regulates billboards is to require that the operator obtain, prior to the erection of the billboard structure, a conditional use permit under the City's zoning code. City Ordinance number 133, Section 19.3, provides that the permit may issue if there is a finding that the structure is not harmful to health, safety, welfare, and esthetics, in accordance with detailed standards set forth at length following the introductory or prefatory statement. Petition, Appendix B, pages B-3—B-11.

The issue is whether the standards confer "unfettered discretion" that could be used to discriminate on the basis of the content of speech.

## II
## THE BILLBOARD OPERATORS MISSTATE THE PROCEDURAL HISTORY OF THE CASE

Although it probably makes little difference to the review of this matter on a writ of certiorari, the procedural history should be set straight. The Superior Court action against Outdoor Media Group, Inc., was not a "response" to the filing of this federal suit; it was an independent nuisance abatement action made necessary by the billboard operator's erecting a billboard *on a weekend*, beside the main freeway route through the City, without a conditional use permit or a building permit, and then lying about it.

On or about March 24, 1989, the City moved to dismiss this federal suit, based on *Younger v. Harris*, 401 U.S. 33 (1971). The district court granted the motion and dismissed the case. Then, on or about July 14, 1989, in response to an ex parte application by the billboard operators (represented by the same law firm that represents Desert Outdoor Advertising, Inc., in this Court), and without prior notice to the City or an opportunity for the City to be heard, the district court vacated its order dismissing the case, retained jurisdiction over the federal claims, abstained based on *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), and stayed the federal proceeding.

The billboard operators were not "forced" to obtain any injunction about anything. However, based upon a "two-bites-of-every-apple" litigation technique, the billboard operators sought to defend the State court abatement actions by invoking certain provisions of the federal Constitution and the corresponding provisions of the California Constitution. Only by moving for summary adjudication of those defenses was the City able to make the billboard operators elect a forum to litigate those issues.

## III
## WHAT THE BILLBOARD OPERATORS HAVE CHARACTERIZED AS "MISSTATEMENTS" ARE, AT MOST, DIFFERENCES OF INTERPRETATION

Apparently influenced by the admonition in Rule 15.2, the billboard operators have spent eight pages of their Respondents' Brief listing what they are pleased to call "misstatements" and "misrepresentations" in the Petition. Most of these are simply matters about which the parties have disagreed and continue to disagree. Whatever do not fall into that class are misrepresentations—some of them serious—by the billboard operators themselves.

The regulation of billboards in City of Moreno Valley Ordinance number 133 is content neutral because it is applied prior to the existence of any content whatsoever. The regulation to which the billboard operators primarily object is a zoning restriction; no billboards ("outdoor advertising structures") may be constructed except in three zones. (The billboards at issue in this case were erected in other zones, without permits, in defiance of the zoning regulations.) Because the zoning applies to the *structure*, and prohibits *all* structures, it is inherently and ineluctably content neutral.

It is, therefore, not a "false assertion," but a most apt analogy, to compare the permit requirement for a billboard *structure* to that required for a theatre *structure* or a church *structure*. When a billboard operator seeks a permit to erect a structure, on which he will rent out space to advertisers, all that anyone knows—including the billboard operator itself—is that advertising copy will eventually be displayed; no one knows what the copy will say, and, indeed, it is expected by everyone that the copy will change over time. Similarly, when a theatre operator seeks a permit to erect a structure in which

he will produce plays or exhibit films, all that anyone knows—including the theatre operator—is that plays or movies will be shown; no one knows what those shows will be, and, indeed, it is expected by everyone that the shows will change over time.

It is a false statement on the part of the billboard operators that "a prospective builder of a sign would have to consider whether [it] intended the proposed sign to carry a political or other message that would make the sign a Display, and decide accordingly whether to apply for a permit." In fact, all that a prospective builder would have to know is whether it is erecting a sign on the premises of its business, or whether it is going into the business of renting space to off-premises advertisers. The billboard industry is a recognized business; it is defined and regulated in California under the Outdoor Advertising Act. California BUSINESS AND PROFESSIONS CODE, §§5200 *et seq*. It is preposterous of the respondents (Desert *Outdoor Advertising*, Inc., and *Outdoor Media* Group, Inc.) to suggest that a permit applicant would not know whether it was in the outdoor advertising business.

The Ninth Circuit's interpretation of the standards for issuing permits for outdoor advertising structures is truly eccentric. Ordinance number 133 is the part of the City's zoning code that regulates advertising. Section 19.3 of Ordinance number 133 is the section that regulates billboards. Section 19.3 begins with a preface, setting forth the purpose of the regulations that follow, including a clear statement that billboards are to be regulated in the interest of public health, safety, and esthetics. The preface is followed by a detailed statement of standards and procedures.

The Court of Appeals eccentrically found that the ordinance vested unbridled discretion in the City's planning officer. According to the Ninth Circuit, the officer is given no standards by which to decide on a permit application. But the language relied on for this

bizarre finding, which is the language quoted by the billboard operators at page 7 of their Respondents' Brief, is the preface to the longest part of Ordinance number 133, and is immediately followed by two substantive sections entitled "Locational Standards" and "Structural Standards." Petition, Appendix B, pages B-4—B-5.

The most eccentric factor of all is that it is that preface to Section 19.3 (the section of Ordinance number 133) that actually regulates billboards, and it contains a clear statement that billboards are being regulated in the interest of health, safety, and esthetics. That statement of purpose is immediately followed by the esthetic and safety standards to be applied. Only a jurist predisposed to outlaw all regulation of billboards and to vitiate this Court's holding in *Metromedia, Inc., v. City of San Diego*, 453 U.S. 490 (1981), could have interpreted the ordinance as the Ninth Circuit did.

It is completely and utterly inaccurate to compare City of Moreno Valley Ordinance number 133, section 19.3, to the ordinance that was at issue in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). The complete text of the ordinance that was at issue in that pre-*Metromedia* case is set forth in this Court's opinion at pages 149-150. A comparison of that ordinance with pages B-3—B-11 of Appendix B to the Petition will demonstrate, in short order, how fatuous is the billboard operators' contention.

The billboard operators' argument in the first full paragraph on page 8 of their Respondents' Brief is incomprehensible. The Ninth Circuit declared that the exemption of four categories of signs and notices from the general regulatory scheme renders the whole scheme constitutionally infirm under the First Amendment. Petition, Appendix A, page A-13. Two of those categories are official notices and directional signs. If one takes the Ninth Circuit opinion literally (and how else might one take it?), the exemption of official notices (such as weed abatement notices) and directional signs (such as those

directing traffic) tends to convert the entire regulatory scheme into a violation of the First Amendment. To the extent that any sense can be made of the first paragraph on page 8 of the Respondents' Brief, it appears to be an attempt to mislead this Court.

In their brief in this Court, the billboard operators go further. They contend that so long as a city allows "for sale" signs to be posted on properties throughout the city, any limitation on other signs or billboards is an unconstitutional content-based regulation. Respondents' Brief, page 14. Presumably, after "for sale" signs are banned, real estate agents will have to rent billboard space to list the addresses of homes and business properties for sale throughout the city. The City need do no more than to cite the billboard operators' own brief to convey the lunacy of their position.

The billboard operators purport to find "confusing" the concept that different regulation is not the same as more restrictive regulation. Ordinance number 133 regulates billboards more restrictively than on-site signs, in that it makes billboards a permissible use in fewer zones than on-site signs. Ordinance number 133 restricts billboards less restrictively than on-site signs in that it allows them to be higher off the ground and much larger than on-site signs. The billboard operators state, accurately enough, that their suit challenged only the zoning restrictions. The City contended, throughout the proceedings that the more restrictive zoning was balanced by less restrictive size and height allowances. However, the Ninth Circuit went far beyond anything contained in the pleadings or the final pretrial order, and—despite the wishes of all litigants—the entire ordinance is at issue for purposes of this Petition, and not just those parts challenged by the billboard operators in their pleadings.

## IV
## THE BILLBOARD OPERATORS SEEK TO MISLEAD THIS COURT CONCERNING HOW THE ORDINANCE WORKS

The billboard operators' fundamental premise throughout this litigation has been that they own the only medium for political and other noncommercial advertising. However, in a major concession and a judicial admission, in their Respondents' Brief, the billboard operators admit that five percent of the on-site signs in Moreno Valley bear noncommercial messages. Respondents' Brief, page 14. Although there is no evidence in the record concerning the percentage of billboard advertising that is "noncommercial," it is virtually certain that that number is far lower than five percent. By their admission at page 14 of their brief, the billboard operators have conceded that their entire case is without merit.

Hence, the billboard operators' discussion, at pages 13-14 of their brief, concerning "how the ordinance works" is misleading.

The ordinance recognizes two basic classes of advertising. There are on-site signs, and there are off-premises advertising structures/displays (commonly called, and even called by the respondents, "billboards"). These are regulated differently. Billboards, which have changeable copy and do not advertise goods or services colocated with the billboards, are regulated by Section 19.3; which expressly incorporates those provisions of the State Business and Professions Code which regulate the outdoor advertising (i.e., billboard) business. On-site signs are regulated by Section 19.4. Billboards are allowed to be up to twice as high as on-site signs, and up to four times as large; however, they are restricted to certain industrial and commercial zones, while on-site signs are allowed in many more zones throughout the City.

That is how the ordinance works. The ordinance, in its entirety, constitutes Appendix B to the Petition, and anybody can see how it works.

## V
## A CITY DOES NOT HAVE TO PROVE THAT ITS ORDINANCES ACTUALLY ENHANCE SAFETY AND ESTHETICS

One of the main contentions of the billboard operators throughout this litigation has been that the City of Moreno Valley bears some burden of proving that its ordinance has actually enhanced public safety and community esthetics. *See* Respondents' Brief, pages 9-10. The Ninth Circuit apparently agreed. Petition, Appendix A, page A-11.

A similar contention was made by another billboard operator in *Ackerley*. 108 F.3d at 1097. In that case the Ninth Circuit disagreed. *Id.* at 1099-1100. The petitioners in this case are reliably informed that a petition for certiorari will be filed in the *Ackerley* case.

The Ninth Circuit in the instant case is wrong, and the Ninth Circuit in *Ackerley* is correct. This Court should grant certiorari in order to provide definitive guidance to a confused and divided Ninth Circuit.

The billboard operators in the instant case have previously contended, and the Court of Appeals apparently agreed, that the City's burden was to show that this particular ordinance was successfully accomplishing the goal of enhancing public safety and esthetics. "[T]he City failed to provide any evidence . . . that the ordinance furthered those interests." Appendix A, page A-11.

The respondents, recognizing the absurdity of requiring a city to prove the efficacy of its ordinances even while those ordinances are being flouted by the respondents themselves, have backed off from their original position and repudiated the position of the Court of Appeals. The burden on the City, they now contend for the first time, is to present evidence that restrictions on billboards "anywhere in the world" promote safety and esthetics. Respondents' Brief, page 9. The burden, the respondents now say, would be met by the introduction of "expert testimony or other evidence" that billboards are ugly and/or cause accidents. *Id.*, page 10.

This Court has already definitively recognized that the regulation of billboards promotes the interests of esthetics and public safety. *Metromedia*, 453 U.S. at 512 (1981). The Ninth Circuit itself has acknowledged this. *Ackerley*, 108 F.3d 1098. The City of Moreno Valley, like any other municipality in the country, is entitled to rely on this proposition as a matter of law. *See Ackerley* at 1097-98.

## VI
## THIS COURT HAS RECOGNIZED THE REGULATION OF BILLBOARDS TO BE *SUI GENERIS*

In the unrelenting campaign of billboard operators to attack municipal regulations all across the country, the billboard operators try to persuade the courts to overlook this Court's opinion in *Metromedia* and to analyze each separate ordinance not under the criteria of *Metromedia*, but under criteria established in other cases to deal with the regulation of other subjects. *See* Respondents' Brief, pages 15-16; *cf. Ackerley*, 108 F.3d at 1097-98. However, "each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses, and dangers' of

each method." *Metromedia*, 453 U.S. at 501 ("deal[ing] here with the law of billboards").

In *Metromedia*, this Court held that billboards could be regulated, and even prohibited altogether. This Court set forth the reasons why such regulation was consistent with the First Amendment and indicated the limits on such regulation. After *Metromedia*, the question of whether billboards may be regulated is no longer an open one.

Moreover, municipal regulation of billboards is to be analyzed in accordance with the principles enunciated in *Metromedia*, and not by analogy to regulations dealing with other forms of expression or with the advertisement of particular commodities. Although the Ninth Circuit stumbled over the issue in the instant case, it has not always done so: "We hold that *Metromedia* continues to control the regulation of billboards." *Ackerley*, 108 F.3d at 1099.

In a weak effort to distinguish the instant case, the Ninth Circuit in *Ackerley* characterized this as a case in which the "city made no effort to show that it enacted its billboard ordinance to further any interest in esthetics and safety." *Id.* However, that is manifestly not the case. The very section of Ordinance number 133 that comprises the regulation applicable to billboards, and introduces the detailed standards to be employed in such regulation, states that permits for billboards will not be issued absent a finding "that such a display will not have a harmful effect upon the health or welfare of the general public and will not be detrimental to the esthetic quality of the community . . . " Appendix B, page B-4.

Is constitutionality really a question of where the "statement of purpose" is placed? Or of how many words it contains? *Cf. National Advertising Co. v. Town of Babylon*, 900 F.2d 551, 555 (2d Cir. 1990), *cert. den.* 498 U.S. 852 (1990); *but see Dills v. City of*

*Marietta*, 674 F.2d 1377, 1381 (11th Cir. 1982), *cert. den.* 461 U.S. 905 (1983) (general statements of purpose are often mere rationalizations).

Given that this Court has, and other courts have, held that regulation of billboards necessarily tends to promote public safety and community esthetics, is it really necessary that there be a "statement of purpose," as such, at all? If the regulation of billboards actually promotes safety and esthetics, would that be any less true if the particular members of a given city's governing board enacted such regulations because they were bribed to do so by, say, the skywriting industry lobby?

## VII
## AN ACCURATE STATEMENT OF THE CASE SHOWS THAT THE INDIVIDUAL EMPLOYEES ARE ENTITLED TO QUALIFIED IMMUNITY

In an attempt to prevent this Court from reviewing the qualified immunity issue with respect to the individual City employees, the billboard operators have misstated the case.

The individual City employees are entitled to qualified immunity unless, under established law, as of 1988, a reasonable official, similarly situated, would necessarily have known that the employees' alleged acts violated the clearly established rights of the billboard operators.

The billboard operators attempt to introduce confusion about what those alleged acts were. Basically, they fall into two categories, steps taken to enforce the ordinance and torts under State law. The first group of allegations referred to by the billboard operators in their brief are merely increasingly hyperbolic ways of stating that the employees attempted to enforce the ordinance

(sending of violation notices, threats of prosecution, attempts to promulgate and enforce an ordinance, "harassment").

One of the billboard operators (Outdoor Media Group, Inc.) attempted to introduce the second group of allegations into the final pretrial order for the sole purpose of preventing judgment on the pleadings. The allegations are of State law torts (interference with contract, defamation). The allegations were not contained in the complaint, and, if they had been contained in the complaint, they would have been dismissed in July 1989, when the district court abstained and expressly retained jurisdiction over the federal constitutional issues only. The City and the other defendants in the district court objected to the unilateral attempt to introduce these allegations into the final pretrial order, and the district court obviously treated them as nullities.

Even the Ninth Circuit dealt only with the allegations of attempts to enforce the ordinance. The Court of Appeals reversed the grant of qualified immunity because "the City officials, in attempting to enforce the ordinance, violated clearly established constitutional rights of which a reasonable person would have known," although the United States District Judge evidently did not.

In the clear light of an honest statement of the issue, it becomes clear that the City employees are entitled to qualified immunity, and this Court should grant certiorari for the purpose of reversing the judgment of the Ninth Circuit on that issue.

## VIII
## CONCLUSION

For the reasons set forth in the Petition, and because the opinion of the Ninth Circuit in this case conflicts with the opinions of other circuits and of the Ninth Circuit in other cases, and, not least, because the billboard operators themselves agree that this case presents issues for review by this Court, the City of Moreno Valley, et al., respectfully submit that a writ of certiorari should issue from this Court to the United States Court of Appeals for the Ninth Circuit.

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